Supreme Court, U.S.
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In The

Supreme Court of the United States

Steven Biener and Carol Greenway,
Petitioners,

v.

Frank Calio, in his official capacity as Delaware Election Commissioner, and The Democratic Party of the State of Delaware,
Respondents.

On Petition for A Writ of Certiorari To the United States Court of Appeals For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Large ballot access fees continue to block qualified citizens of modest means from seeking electoral office. The Circuits are conflicted over the appropriate standard of review that should be applied under the Equal Protection Clause to filing fees. Further, the Circuits are unclear over the federal Qualifications Clauses' application to ballot access restrictions.

1 Whether a state's significant and burdensome filing fee for congressional office is subject to simple rationality review or demands more exacting judicial scrutiny?

2. Whether a narrowly defined poverty exception insulates a state's significant and burdensome filing fee from serious scrutiny under the Fourteenth Amendment's Equal Protection Clause?

3. Whether the Qualifications Clauses limit a state's power to demand a substantial mandatory filing fee from a candidate for congressional office?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Steven Biener and Carol Greenway, petition the Court for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Third Circuit, entered March 19, 2004, affirming summary judgment in favor of the Respondents, Frank Calio, in his official capacity as Delaware's Election Commissioner, and the Democratic Party of the State of Delaware.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Scirica, C.J., Nygaard and Ambro, JJ.) is reported at 361 F.3d 206 (3d Cir. 2004), and is included in the Appendix (App., *infra*, at A-25). The final judgment of the United States District Court for the District of Delaware is not reported and is reproduced in the Appendix (App., *infra*, at A-13). The order of the United States District Court for the District of Delaware denying Petitioners' motion for preliminary injunction is reported at 209 F.Supp.2d 405 (D. Del. 2002), and is included in the Appendix (App., *infra*, at A-1).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 19, 2004. Petitioners did not seek rehearing nor rehearing en banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I, § 2, cl. 2:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. Const., amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Del. Code Ann. tit. 15, § 3103:

> (a) Filing fees for primary election for candidates for any office of any political party shall be set in the following manner:
>
> (1) Candidates for statewide office shall be set by the state executive committee of the respective political party;
>
> (2) Candidates for county or countywide office and members of the General Assembly shall be set by the county executive committee of the respective political party of the county in which the contest is to be held;
>
> (3) Candidates for municipal office for any municipality which holds its election at the time of the general election shall be set by the city executive committee of the respective political party of the city in which the contest is to be held;

(4) [Repealed.]

(b) The filing fee shall not be greater than 1% of the total salary for the entire term of office for which the candidate is filing except for candidates who fulfill the requirements of subsections (d) and (e) of this section.

(c) The state chair, county chair and city chairs of each political party shall notify the State Election Commissioner and the respective departments of elections of the amount of the filing fee set pursuant to this section. The notification shall be no later than July 1 of each general election year.

(d) A person who establishes indigency to the Commissioner may, in lieu of the filing fee, present a nomination petition by the deadline for notification of candidacy, in a form prescribed by the Commissioner of Elections, bearing the signatures, in the manner hereinafter prescribed, of 1 percent of the persons who, at the time such petition is presented, are registered voters in all of the election districts in which such candidate would appear on the ballot. Each person who signs a nomination petition shall sign but 1 such petition for each office to be filled, and must be a registered member of the party designated in such petition; provided however, that where there are to be elected 2 or more persons to the same office, each signer may sign petitions for as many candidates for such office, as, and no more than, the signer could vote for at the succeeding election. Each signer of such petition shall declare the signer's street address, the date of signature and that the signer is a registered voter of the county and of the party therein named. No nomination petition shall be circulated before the year in which the election is to take place, and no signature shall be counted unless it bears a date affixed not earlier than January 1 of the year in which the

election is to take place. Said nomination petition may be on 1 or more sheets, and different sheets must be used for signers who reside in different counties. If more than 1 sheet is used, they shall be bound together when offered for filing, and each sheet shall be numbered consecutively. Each sheet shall bear the affidavit of the person responsible for circulating the petition that to the best of affiant's knowledge and belief, the signers are registered voters in election districts in which such candidate would appear on the ballot and members of the political party of the candidate.

(e) For purposes of this section, a person is "indigent" only if such person is receiving benefits under the Supplemental Security Income Program for Aged, Blind and Disabled under Subchapter XVI of Chapter 7 of Title 42 of the United States Code [42 U.S.C. § 1381, et seq.], or if the Commissioner determines that such person meets the income and resources tests for such benefits under 42 U.S.C. § 1382(a), as applied to Delaware residents. The Commissioner shall require any person who seeks to be treated as indigent under this section to provide such information under oath necessary to determine any claim of indigence, including copies of such person's personal income tax returns and may require the person to authorize the Commissioner to receive information from banks, the Social Security Administration, credit reporting services and any other source of information as may be necessary to make the determination under this section.

STATEMENT OF THE CASE

This is a challenge to Delaware's $3000 filing fee for House primary elections. Unlike most states, Delaware provides no exception or waiver for candidates who are financially burdened by filing fees. Instead, Delaware

waives its fee only for candidates who, if they were disabled, would qualify for federal Supplemental Security Income (SSI). Petitioner, Steven Biener, ran in Delaware's Democratic House primary in 2002. Because he refused campaign contributions and had limited personal resources, Biener asked Respondent, Frank Calio (Delaware's Elections Commissioner), to waive the state's fee. Specifically, because he had limited resources to spend on his campaign and refused contributions, Biener claimed that he would "suffer financial hardship if required to pay." Complaint for Declaratory and Injunctive Relief ¶ 16. Calio denied Biener's request. Following the District Court's denial of Biener's motion for preliminary relief, *see* App., *infra*, at A-1, Biener paid Delaware's $3000 fee under protest. Even though he was left with only $1400 to pursue his candidacy, Biener received over 48 percent of the vote in his unsuccessful bid to win the Democratic primary.

Like most states,[1] Delaware uses filing fees to limit access to primary ballots – including those in congressional

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[1] *See* Ala. Code § 17-16-15 (filing fee equal to 2% of office's salary may be charged by parties); Alaska Stat. § 15.25.050(a) ($100 filing fee for House elections); Cal. Elec. Code § 8104(b) (filing fee equal to 1% of office's annual salary); Del. Code Ann. tit. 15, § 3103(b) (filing fee not to exceed 1% of total salary for term); Fla. Stat. Ann. § 99.092(1) (filing fee equal to 6% of annual salary); Ga. Code Ann. § 21-2-131(a)(2) (filing fee equal to 3% of annual salary); Haw. Rev. Stat. § 12-6(b)(1) ($75 fee for House elections); Idaho Code § 34-605(4) ($300 filing fee for House elections); Kan. Stat. Ann. § 25-206(a) (filing fee equal to 1% of annual salary); Ky. Rev. Stat. § 118.255(1) ($500 filing fee for House elections); La. Rev. Stat. Ann. § 18:464.B(1) & C ($600 filing fee for House elections plus up to $300 assessment by parties); Md. Elec. Law § 5-401(c) ($100 fee for House elections); Minn. Stat. Ann. § 204B.11(1)(a) ($300 filing fee for House elections); Miss. Code Ann. § 23-15-297(b) ($200 filing fee for House elections); Mo. Ann. Stat. § 115.357.1(1) ($100 filing fee for House elections); Mont. Code Ann. § 13-10-202(3) (filing fee equal to 1% of annual salary); Neb. Rev. Stat. § 32-608(2) (filing fee equal to 1% of annual salary); Nev. Rev. Stat. Ann. § 293.193.1 ($300 filing fee for House elections); N.H. Rev. Stat. Ann. §§ 655:19 & 655:19-c.I(b) ($5000 filing fee for House elections, but reduced to $50 if candidate agrees to spending limits); N.C. Gen. Stat. §

elections. For House elections, states commonly set their filing fees at flat rates well below $1000,[2] or cast their fees as small percentages of the annual congressional salary – like the 1% figure chosen by California.[3] Three-quarters of the states that use filing fees charge $1500 or less for House elections.[4]

Some states, like Delaware, delegate to political parties the power to set filing fees.[5] Delaware, for its part, has authorized the two major political parties to charge filing fees up to 1% of the total salary for the full term of office. Parties are thus authorized by Delaware law to charge House candidates $3000 and Senate candidates $9000 in order to

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163-107(a) (filing fee equal to 1% of annual salary); Ohio Rev. Code Ann. § 3513.10(A) & (B) ($85 fee and 50 signatures required for House elections); Okla. Stat. tit. 26, § 5-112 ($750 filing fee for House elections); Or. Rev. Stat. § 249.056(1)(b) ($100 filing fee for House elections); Pa. Stat. Ann. tit. 25, § 2872.1 ($150 filing fee for House elections plus 1000 signatures from party members); S.C. Code Ann. § 7-13-40 (filing fee equal to 1% of annual salary); Tex. Elec. Code Ann. § 172.024(a)(3) ($2500 filing fee for House elections); Utah Code Ann. § 20A-9-201(6)(a)(ii) (filing fee equal to 1/8 of 1% of total salary for term); Va. Code Ann. § 24.2-253 (filing fee equal to 2% of annual salary plus signature from ½ of 1% of registered voters in district); Wash. Rev. Code § 29.15.050 (filing fee equal to 1% of annual salary); W.Va. Code § 3-5-8(a) (filing fee equal to 1% of annual salary); Wyo. Stat. Ann. § 22-5-208(a)(ii) ($200 filing fee for House elections).

[2] Ohio Rev. Code Ann. § 3513.10(A) & (B) ($85 fee and 50 signatures required for House elections).

[3] Cal. Elec. Code § 8104(b) (filing fee equal to 1% of office's annual salary).

[4] *See* Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 Ohio St. L.J. 1281, 1296 (1997) ("Of those states using fees either as the sole method for qualification or as an alternative method of qualification, well over three-quarters have settled on fees less than or equal to 1% of the congressional salary").

[5] *See, e.g.*, Ark. Code Ann. § 7-7-301 (authorizing parties to set their own fees); Ala. Code § 17-16-15 (authorizing parties to assess fees not to exceed 2% of salary).

run for office. The Democratic Party charged these full amounts in 2002.

As a result of this Court's holdings in *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974), which are explained more fully below, roughly one-third of the states today have dispensed with filing fees for both state and federal elections. Except for Indiana,[6] which imposes no access restrictions on House elections, these states require candidates to collect voters' signatures in order to gain access to primary election ballots.[7] Though the number of signatures varies, states commonly require approximately 1000 signatures (or fewer) for candidates to have their names included on House primary ballots.[8]

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[6] *See* Brown, *supra* note 4, at 1286 n. 15 (1997) (observing that Ind. Code Ann. § 3-8-2-8(a) requires 5000 signatures for Senatorial primaries, but not for House primaries).

[7] Ariz. Rev. Stat. § 16-322.A.2 (qualify by collecting signatures from ½ of 1% of registered party members in district); Colo. Rev. Stat. § 1-4-801(2)(b) (1000 signatures for House elections); 10 Ill. Comp. Stat. Ann. 5/7-10(b) (signatures from ½ of 1% of party members in district); Iowa Code § 43.20.3 (signatures from 2% of voters from party who participated in last general election and not less than 1% of total vote of candidate's party in district in last election); Me. Rev. Stat. Ann. tit. 21-A, § 335.5.C (1000 signatures from voters in district); Mass. Ann. Laws ch. 53, § 6 (2000 signatures from voters); Mich. Comp. Laws § 168.133 (submit signatures from 1% of party voters for secretary of state in district in last election); N.J. Stat. Ann. § 19:23-8 (200 signatures from party members in district who voted in last election); N.M. Stat. Ann. § 1-8-33 (pre-primary requires signatures from 2% of party voters in last gubernatorial election); N.Y. Elec. Law § 6-136.2(g) (1250 signatures from party members in district); N.D. Cent. Code § 16.1-11-06 (300 signatures from qualified voters); S.D. Codified Laws § 12-6-7 (signatures from 1% of party voters who participated in last gubernatorial election); Tenn. Code Ann. § 2-5-101(b)(1) (25 signatures from voters); Vt. Stat. Ann. tit. 17, § 2355(1) (500 signatures from voters in district); Wis. Stat. Ann. § 8.15(6)(b) (1000 signatures from voters in district). Indiana charges neither a fee nor demands signature collection to access primary ballots for House elections.

[8] *See, e.g.*, Colo. Rev. Stat. § 1-4-801(2)(b) (requiring 1000 signatures); Me. Rev. Stat. Ann. § tit. 21-A, § 335.5.C (same).

Because of *Bullock* and *Lubin*, those states that have retained filing fees, like Delaware, generally recognize non-monetary alternatives for primary ballot access.[9] A handful of states – Alabama, for example[10] – simply waive filing fees for candidates who are "indigent" or "unable" to pay.[11]

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[9] A few states continue to charge fees without expressly providing for alternative access mechanisms. *See* Ky. Rev. Stat. Ann. § 118.125(2) ($500 fee and two signatures required); Miss. Code Ann. § 23-15-297(b) ($200 fee); Nev. Rev. Stat. Ann. § 293.193.1 ($300 filing fee); Ohio Rev. Code Ann. § 3513.10(A) & (B) (both $85 fee and 50 signatures required); Pa. Stat. Ann. tit. 25, §§ 2872.1 & 2873.1 ($150 fee and 1000 signatures required); S.C. Code Ann. § 7-13-40 (fee equal to 1% of congressional salary); Wyo. Stat. Ann. § 22-5-208(a)(ii) ($200 fee). Because some form of exception is required by *Bullock* and *Lubin*, the constitutionality of these arrangements is questionable. *See Belitskus v. Pizzingrilli*, 343 F.3d 632 (3d Cir. 2003); Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. Pa. L. Rev. 353, 377-78 & n.114 (1996) (arguing that some alternative to filing fees is presumably required).

[10] S*ee Harper v. Vance*, 342 F. Supp. 136, 144 n.9 (N.D. Ala. 1972) (striking down Alabama's flat $850.00 filing fee for Senatorial election and suggesting an exception that would "permit financially unable candidates to qualify by demonstrating their inability to pay"); Ala. Code § 17-16-15 (allowing waiver of filing fee for "indigents").

[11] *See also* Alaska Stat. § 15.25.050(a) (providing that "[a]n indigent person ... may file a statement of indigency ... in place of the filing fee"); Alaska Adm. Code tit. 6, § 25.130 (stating that "[a]ny person who is unable to pay the filing fee for candidacy, and still provide for the necessities of life, may file as an indigent candidate"); Md. Elec. Law § 5-401(c) (stating that "filing fee ... shall be waived if the candidate establishes inability to pay the fee"; "a candidate may demonstrate inability to pay the filing fee by attaching ... a sworn statement ... set[ting] forth: (i) the nature, extent, and liquidity of the candidate's assets; and (ii) the candidate's disposable net income"); Neb. Rev. Stat. § 32-608(5) (waiving fee for a "pauper", defined as "a person whose income and other resources for maintenance are found under assistance standards to be insufficient for meeting the cost of his or her requirements and whose reserve of cash or other available resources does not exceed the maximum available resources that an eligible individual may own" and excluding the person's home, household goods and $3000 in assets to be used "in a planned effort directed toward self-support");

More commonly, however, fee-charging states (like Delaware) alternatively authorize candidates to collect signatures.[12]

Most of the states today that authorize signature collection as an alternative form of ballot access make it available to *all* potential candidates. Rich, poor, and middle-class candidates are all treated alike. They can pay the fee or collect signatures. However, eight states – including Delaware – restrict their signature collection alternatives to poor candidates: those candidates that are either "unable" to pay the required fee or are otherwise "indigent."[13]

Utah Code Ann. § 20A-9-201(6)(d) (waiving fee for persons "unable to pay" upon filing of affidavit of "impecuniosity").

[12] *See, e.g.*, Cal. Elec. Code § 8106(a)(2) (signature collection alternative of 3000 signatures); Del. Code Ann. tit. 15, § 3103(d) (signature collection alternative); Fla. Stat. Ann. § 99.095(1) (signature collection alternative); Ga. Code Ann. § 21-2-132(g) (signature collection alternative); Haw. Rev. Stat. § 12-6(e) (signature collection alternative); Idaho Code § 34-605(4) (signature collection alternative); Kan. Stat. Ann. § 25-206(a) (signature collection alternative); La. Rev. Stat. Ann. § 18:465.C(3)(b) (signature collection alternative); Minn. Stat. Ann. § 204B.11(2)(b) (signature collection alternative); Mo. Rev. Stat. § 115.357.3 (signature collection alternative); Mont. Code Ann. § 13-10-203(2)(b) (signature collection alternative); N.H. Rev. Stat. Ann. § 655:19-c.III (signature collection alternative); N.C. Gen. Stat. § 163-107-1(c) (signature collection alternative); Okla. Stat. tit. 26, § 5-112 (signature collection alternative); Or. Rev. Stat. § 249.056(1)(b) (signature collection alternative); Tex. Elec. Code Ann. § 172.025(2)(B) (signature collection alternative); Wash. Rev. Code § 29.15.050 (signature collection alternative);W.Va. Code § 3-5-8(a) (signature collection alternative).

[13] *See* Del. Code Ann. tit. 15, § 3103(e) (restricting to indigents who "receiv[e] benefits under the Supplemental Security Income Program for Aged, Blind and Disabled under Subchapter XVI of Chapter 7 of Title 42 of the United States Code ... or if the Commissioner determines that such person meets the income and resources tests for such benefits under 42 U.S.C. § 1382(a), as applied to Delaware residents"); Ga. Code Ann. § 21-2-132(g) (providing that the candidate "shall under oath affirm his or her poverty and his or her resulting inability to pay the qualifying fee"); Hawaii Rev. Stat. Ann. § 12-6(e) (providing that the candidate must

Poverty definitions vary among those states that waive fees or condition the availability of signature collection. Of the five states that provide outright waivers, three (including Maryland) require some form of "inability to pay." *See supra* note 11. The other two states limit their waivers to "indigents," s*ee supra* note 10, and "paupers," respectively. *See supra* note 11. Of the eight states that condition their signature collection alternatives on some measure of poverty, five require what amounts to an "inability to pay." *See supra* note 13. Two of the three remaining states require "indigen[ce]," *id.*, and "poverty," *id.*, respectively. Only Delaware sets a specific monetary ceiling on who can use the state's signature collection alternative. In order to qualify to collect signatures in Delaware, a candidate must "receiv[e] benefits under the Supplemental Security Income [SSI] Program for Aged, Blind and Disabled under Subchapter XVI of Chapter 7 of Title 42 of the United States Code" or qualify under the federal "income and resources tests for such benefits under 42 U.S.C. § 1382(a), as applied to Delaware residents." *See* Del. Code Ann. tit. 15, § 3103(e). During the 2002 election, only persons with less than $13,080 in earned income (or $6450 in "unearned" income) qualified under Delaware's alternative access mechanism.[14] Candidates who earn more

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"declare[], by affidavit, that [he] is indigent"); Mo. Rev. Stat. § 115.357.3 (requiring that candidate declare "inability to pay"); Mont. Code. Ann. § 13-10-203 (requiring a "verified statement that he is unable to pay the filing fee"); N.H. Rev. Stat. Ann. tit. 63, § 655:20 (authorizing signature collection by candidate "unable to pay the filing fee ... by reason of indigency"); Wash. Rev. Code Ann. § 29.15.050 (allowing signature collection by "candidate who lacks sufficient assets or income at the time of filing to pay"); W.Va. Code § 3-5-8a (requiring "oath ... stating that he is unable to pay the filing fee due to a lack of financial resources").

[14] The federal Supplemental Security Income (SSI) Program is designed to achieve only minimal subsidence levels, s*ee generally Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989), and thus focuses on disabled individuals who fall below set financial limits. Because SSI eligibility

than $13,080 are thus forced to pay Delaware's fee, even though it causes them tremendous financial hardship, depletes their campaign funds, and reduces their chances of success. Had Biener been allowed to spend $3000 more on his campaign, he would have certainly won more than 48% of the vote. Whether this would have been enough to tilt the election is unclear; but the contest would have been even closer than it already was.

Biener filed suit under the Fourteenth Amendment's Equal Protection Clause, Article I's Qualifications Clause, and 42 U.S.C. § 1983 on June 10, 2002.[15] Following the District Court's denial of Biener's motion for preliminary injunction, *see* App., *infra*, at A-1, Biener paid Delaware's fee under protest and amended his Complaint to seek a refund from the Democratic Party. Biener argued in the District Court that Delaware's refusal to extend its signature collection alternative to all candidates violated the Equal Protection Clause. *See Biener v. Calio,* 209 F.Supp.2d 405, 410 n.4 (D. Del. 2002) (denying preliminary injunction) (App., *infra*, at A-7 n.4); *Biener v. Calio*, 2003 WL 151232 (D. Del. 2003) (awarding final judgment to defendants) (App., *infra*, at A-20 n.5). The District Court disagreed, concluding that "requiring a fee of non-indigent candidates is a rational means of furthering the state's interests in regulating the size of the ballot and avoiding voter confusion leading to the clogging of the election machinery." App.,

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does not equate with the federal government's "poverty threshold," however, there is a risk that even truly poor individuals in Delaware will not qualify for the state's signature collection alternative. According to Census figures, Delaware's income ceiling for ballot access – which in 2002 was $13,080 – falls *below* the federally defined poverty threshold for many American families. *See* www.census.gov/hhes/poverty/threshld/thresh02.html.

[15] Petitioner, Carol Greenway, a local registered Democrat who wished to vote for Biener, joined Biener's suit. *See Biener v. Calio,* 209 F. Supp.2d 405, 406 n.1 (D. Del. 2002) (order denying preliminary injunction). Greenway also joins this Petition.

infra, at A-22. The District Court rejected Petitioners' argument that *Bullock v. Carter*, 405 U.S. 134 (1972), required alternative access for those who were realistically unable to pay a $3000 filing fee: "the Delaware scheme presently at issue unquestionably allows for indigent access." App., *infra*, at A-21. "Biener has ...paid the filing fee in full, demonstrating that he does in fact possess sufficient funds to cover this expense. Accordingly, the court views this case not as one where Biener could not pay, but rather, as one where he affirmatively has chosen not to pay without protest." App., *infra*, at A-18. The court also ruled that Delaware's filing fee was a "procedural" requirement rather than a wealth qualification dressed in 'ballot access clothing', App., *infra*, at A-19, and thus rejected Biener's claim that Delaware's filing fee violated Article I. App., *infra*, at A-19.

The Third Circuit affirmed. *See Biener v. Calio*, 361 F.3d 206 (3d Cir. 2004) (App., *infra*, at A-25). It reasoned that Delaware provided Biener a choice; he could pay the fee and run for office or refuse and sit out the election. "[T]he availability of a choice," the Third Circuit reasoned, "is outcome determinative," App. at A-26, and "fatal to Biener's equal protection claim." App., *infra*, at A-37. Even though Biener made it clear that he refused all campaign contributions and would suffer "financial hardship" if required to pay, the Third Circuit characterized him as one who was "able, but simply unwilling, to pay a filing fee ...." App., *infra*, at A-36. For this class of "able but unwilling" candidates, the Third Circuit concluded that state laws need only pass a rational basis test under the Equal Protection Clause: "The right to run for office has not been deemed a fundamental right. Biener also cannot establish an infringement on the fundamental right to vote, because 'voter's rights are not infringed where a candidate chooses not to run because he is unwilling to comply with reasonable state requirements'." App., *infra*, at A-35. Thus, the Third

Circuit "consider[ed] the claims under a rational basis test." App., *infra*, at A-35-36.

The Third Circuit also rejected Biener's challenge under the Qualifications Clauses. Noting that term limits, district residency requirements, loyalty oaths, voter registration requirements and restrictions on candidacies by convicted felons have all been found to violate the Qualifications Clauses, App., *infra*, at A-30, the Third Circuit concluded that a financially burdensome filing fee did not constitute an impermissible, mandatory wealth qualification. App., *infra*, at A-31.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Conclusion that Significant and Burdensome Ballot Access Restrictions are Subject to Rationality Review Conflicts with Decisions of the Second, Fourth and Eleventh Circuits.

The Third Circuit's application of a rational basis test to Delaware's $3000 filing fee, though supported by the Fifth Circuit's decision in *Adams v. Askew*, 511 F.2d 700 (5th Cir.1975), conflicts with decisions of the Second, Fourth and Eleventh Circuits. These three Circuits have applied more exacting constitutional scrutiny to ballot restrictions, including filing fee requirements, regardless of whether the candidates paid (or were able to pay) the fees. Although recognizing that there is no fundamental right to run for office as such,[16] these three Circuits have recognized that differing rules and disparate treatment in the electoral arena must be closely scrutinized. In particular, the Second, Fourth and Eleventh Circuits have pointed to this Court's decisions in *Bullock v. Carter*, 405 U.S. 134 (1972), *Lubin v. Panish*, 415 U.S. 709 (1974), and *Anderson v. Celebrezze*,

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[16] *See Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality) (observing that "candidacy" itself is not a fundamental right); *see, e.g., NAACP v. Jones*, 131 F. 3d 1317, 1324 (9th Cir. 1997) ("Candidates do not have a fundamental rights to run for public office.").

460 U.S. 780 (1983) (which are discussed in more detail below) as demanding *close* judicial scrutiny of ballot restrictions, including filing fees.

The Fourth Circuit in *Dixon v. Maryland State Adm. Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989), rejected a District Court's conclusion that the availability of an indigence exception, *see supra* note 11, justified applying only a rational basis test to Maryland's $150 filing fee for write-in candidates in local elections. *See Dixon v. Maryland State Adm. Bd. of Election Laws*, 686 F. Supp. 539, 541 (D. Md. 1988). The Fourth Circuit instead concluded that the more searching analysis announced in *Anderson* must be applied. It thus weighed "the *character* and *magnitude* of the asserted injury to the rights protected by the First and Fourteenth Amendments," *id.* at 780 (emphasis original), and "the precise interests put forward by the State as justifications for the burdens imposed." *Id.* at 783. The Fourth Circuit ruled under this balancing formula that Maryland's "filing fee [was] not a sufficiently narrowly drawn method of advancing the State's ... asserted interest in light of the burden ...." *Id.* at 784.[17] *See also Socialist Workers Party v. Hechler*, 890 F.2d 1303, 1307 (4th Cir. 1989) (applying *Anderson* balancing formula to state filing fee waiver/signature collection alternative for ballot access).

The Eleventh Circuit has likewise eschewed simple rationality review in favor of *Anderson*'s balancing test. In *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992), the court applied *Anderson* to strike down an indigence waiver allowed some, but not all, Presidential candidates. In order to access Florida's Presidential ballot, minor and independent candidates were required to collect signatures

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[17] Because the challengers, who did not pay, refused to apply for an indigence exception, their challenge to the limited nature of the exception was not considered. *See* 878 F.2d at 778 n.5 ("Because they did not apply for such waivers, their argument is not properly before us and will not be considered."). They were thus treated as if they could pay.

and pay verification fees. Independent candidates who were unable to pay were provided a waiver of the verification fee. Minor party candidates, in contrast, were not. Even though the minor party candidate in *Fulani* was able to pay the fee, *see id.* at 1544, and the court expressed some reservation,[18] the Eleventh Circuit struck down the disparate treatment using *Anderson*'s balancing formula.

Similarly, in *Green v. Mortham*, 155 F.3d 1352 (11th Cir. 1998), the Eleventh Circuit used *Anderson*'s balancing test to assess the validity of Florida's filing fee and signature collection requirements for House primaries. Florida, at that time, demanded a filing fee of over $10,000. *Id.* at 1333. Alternatively, *any* candidate could collect signatures in order to gain access to primary ballots. *Id.* at 1333-34 & n.5. The Eleventh Circuit found that "the *Anderson* balancing test still controls challenges to ballot access requirements ...." *Id.* Because the signature collection alternative was reasonable, non-discriminatory and available to all, the Eleventh Circuit concluded it passed muster under *Anderson*. *Id.* at 1339.

The Second Circuit applied *Anderson*'s balancing test to restrictions placed on federal elections in *Rockefeller v. Powers*, 917 F. Supp. 155, 160 (E.D.N.Y.), *aff'd*, 78 F.3d 44 (2d Cir. 1996). There, Republican Presidential candidates challenged a New York law that required them to "obtain signatures from 5% or 1250, whichever is less, of the enrolled Republican voters" in a district in order to have their delegates' names placed on the ballot in that district.[19] Because Republican support varied in New York's various congressional districts, the challengers argued, New York's

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[18] The Eleventh Circuit stated that "[i]t is not entirely clear ... whether the Supreme Court would apply this test in an equal protection situation." *Id.* at 1543.

[19] Like Delaware, New York delegated to the parties the power to determine their own access requirements. *See Powers*, 917 F. Supp. At 164 ("the Legislature has offered each political party the option of which alternative to choose").

floor figure had an uneven, unequal effect in violation of the Fourteenth Amendment. The District Court agreed. Applying *Anderson*'s balancing test, 917 F. Supp. at 159-60, the District Court concluded that New York's burden was not sufficiently supported by its interests in limiting ballot access. Because of the impending election, the Second Circuit's opinion affirming the District Court was brief. 78 F.3d at 45. Still, the Second Circuit clearly ratified the lower court's use of *Anderson*'s balancing formula and agreed that New York's "substantial burdens on candidates" were "unnecessary to satisfy" its interests. *Id.* at 45-46.

II. The Third Circuit's Application of Rationality Review is Inconsistent with this Court's Decisions in *Bullock*, *Lubin* and *Anderson*.

Bullock v. Carter, 405 U.S. 134 (1972), involved a challenge under the Equal Protection Clause to Texas's filing fee requirements for various political primaries. The Court concluded that "[b]ecause the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude ... that the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." 405 U.S. at 144. The Court deemed the state's two asserted interests – insuring serious candidacies and defraying the costs of elections – were insufficient to justify Texas's exorbitant fee. Instead, the Court concluded that alternative access had to be provided.

Two years later, in *Lubin v. Panish*, 415 U.S. 709 (1974), the Court invalidated a more modest California fee for House primaries under the Equal Protection Clause. "A large filing fee may serve the legitimate function of keeping ballots manageable, but, standing alone, it is not a certain test of whether the candidacy is serious or spurious. A wealthy candidate with not the remotest chance of election may

secure a place on the ballot by writing a check. ... [P]rohbitive filing fees, such as those in *Bullock*, can effectively exclude serious candidates .... Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candidates without regard to their economic status." 415 U.S. at 717-18. The Court applied *Bullock*'s 'close scrutiny' to reject California's claim that its fee was justified to prevent "nonserious candidates." *Id.* at 714. "This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." *Id.* at 716. Because California lacked a non-monetary alternative, it risked "exclud[ing] some potentially serious candidates from the ballot ...." *Id.* at 717. "Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Id.* at 718.

This Court further elaborated the proper level of heightened analysis in ballot access settings in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). There, a Presidential hopeful (John Anderson) challenged Ohio's early registration requirement for independent candidates. Turning to First Amendment associational rights, the Court concluded that challengers' access rights must be balanced against states' concerns in managing their ballots:

> Constitutional challenges to specific provisions of a State's election laws [cannot] be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions. Instead, [a court] must first consider the character and magnitude of the asserted injury to the rights ... that the plaintiff seeks to

> vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.

460 U.S. at 789.

Later cases' citations to *Bullock* as a classical example of unconstitutional regulation, *see, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 360 (1997) (sustaining Minnesota's anti-fusion law because unlike Texas in *Bullock* Minnesota had not "excluded a particular group of citizens, or a political party, from participation in the election process"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 & n.14 (1996) ("[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license"), demonstrate that substantial filing fees, like that charged by Delaware, are still constitutionally suspect. *See also Clements v. Fashing*, 457 U.S. 957, 964 (1982) (plurality) (observing that Equal Protection demands more than rationality review when ballot restrictions "invidiously burden those of lower economic status"). The Third Circuit's application of a rational basis test thus proves inconsistent with this Court's precedents.

III. The Third Circuit's Conclusion that a Poverty Exception Insulates Delaware's Substantial Fee Contradicts Fourth Circuit Precedent.

In *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3d Cir. 2003), the Third Circuit invalidated a Pennsylvania filing fee for local office because it lacked a waiver or non-monetary alternative. Like Petitioner in the present case, the candidates in *Belitskus* were not destitute; rather, they argued only that paying Pennsylvania's $100 and $200 filing fees would cause them "financial hardship." *Id.* at 637. The

Third Circuit here distinguished *Belitskus* as a case where the state "failed to provide a reasonable alternative means of ballot access to indigent candidates. ... We applied a heightened level of scrutiny because indigent plaintiffs were challenging a mandatory fee." *Biener*, 361 F.3d at 213 (App., *infra*, at A-33). Key to the Third Circuit's conclusion in *Biener* was thus the availability of *some* alternative access – regardless of whether it was available to candidates (like Biener) who claimed financial hardship or inability to pay. *See* App., *infra*, at A-26, A-37 ("the availability of a choice ... is outcome determinative" and "fatal to Biener's equal protection claim").

No other Circuit has concluded that a simple poverty exception insulates a state's significant filing fee from serious constitutional scrutiny. The Fourth Circuit rejected this conclusion in *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776, 777-78 (4th Cir. 1989). There, the Fourth Circuit struck down Maryland's $150 filing fee for write-in candidates even though it provided an exception for candidates who were "[unable] to pay the fee." The question, the Fourth Circuit determined, was whether the fee was necessary to the state's ends – with or without an exception for those who were unable to pay. *Id.* at 784. The Ninth and Eleventh Circuits, meanwhile, have sustained substantial filing fee requirements precisely because alternative access was available to *all*, as opposed to some, candidates. *See Andress v. Reed,* 880 F.2d 239 (9th Cir. 1989) (sustaining filing fee for Senatorial election equal to 1% of office's salary where signature collection alternative existed for all candidates); *Green v. Mortham*, 155 F.3d 1332 (11th Cir. 1998) (sustaining filing fee for House election equal to 7 ½ % of office's salary where signature collection alternative existed for all candidates).

This Court in *Lubin* suggested two possible solutions to the impermissible wealth discrimination perpetuated by large filing fees, both of which have been implemented by

several states. First, the Court opined, states might use signature collection alternatives:

> [T]here are obvious and well-known means of testing the 'seriousness' of a candidacy which do not measure the probability of attracting significant voter support solely by the neutral fact of payment of a filing fee. ... [A] candidate who establishes that he cannot pay the filing fee required for a place on the primary ballot may be required to demonstrate the 'seriousness' of his candidacy by persuading a substantial number of voters to sign a petition in his behalf.

415 U.S. at 718. About one-half of the states today either rely exclusively on signature collection or alternatively make it available to *all* candidates (regardless of wealth). *See supra* at 9. Second, the Court in *Lubin* suggested that an exception for those who "*cannot pay*" might suffice. 415 U.S. at 718 (emphasis added). Approximately one-quarter of the states today use indigence in some fashion to limit alternative access. *See* supra at 9-10. Because California provided *no* exception, the Court in *Lubin* was not compelled to address either possibility at length. While it has yet to flesh out the details of alternative access, however, it emphatically stated in *Lubin* that "[*t*]*he point, of course, is that ballot access must be genuinely open to all*, subject to reasonable requirements." *Id.* at 718-19 (emphasis added).

Far from insuring that "ballot access [is] genuinely open to all," the Third Circuit's decision bars a sizeable number of citizens from the ballot. Three distinct classes of candidates exist in Delaware, only two of which have any genuine opportunity to gain access. The first class, consisting of incumbents, wealthy challengers and those willing (and able) to solicit campaign contributions from special interests, can readily pay Delaware's $3000 fee. The second, consisting of destitute candidates who qualify for federal SSI benefits, is allowed signature collection as an

alternative. The third group, consisting of low- to middle-income challengers who are unwilling (or unable) to tap others for campaign contributions, are shut out of the political arena. Access is genuinely open to those in the first class, and may be available to those in the second, but it is only a pipe dream for those who must choose between spending their savings on ballot access and supporting their families.

The Third Circuit's conclusion that Biener was "able" but "unwilling" to pay Delaware's fee assumed that Biener could raise or replace Delaware's filing fee by soliciting contributions. As this Court made clear in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003), however, fundraising risks an appearance of corruption and political impropriety. In order to avoid such an appearance, Biener refused campaign contributions and financed his candidacy himself. Delaware's financial demand depleted Biener's campaign chest by forcing him to spend three-quarters of his political budget at the electoral gate. Armed with four times the money he actually spent, it is not fanciful to believe that Biener could have reached the 656 additional voters he needed to win the Democratic nomination. For Biener, Delaware's fee was likely outcome determinative.

By assuming that Biener could solicit contributions to cover Delaware's filing fee, the Third Circuit not only minimized the thrust of Biener's campaign – which eschewed purchased influence – it put him to an unconstitutional choice. He could either abandon his political convictions or take his chances on an unequal playing field. According to *Bullock*, candidates cannot be expected to abandon their political convictions in order to access ballots. There, Texas argued that candidates who could not afford primary filing fees could always run independently in the general election. This Court responded: "we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party

affiliations in order to avoid the burdens of the filing fees imposed by state law." 405 U.S. at 146-147. *See also Cook v. Gralike*, 531 U.S. 510 (2001) (holding that states cannot place congressional candidates at a political disadvantage by including on ballots whether they favor term limits). Forcing candidates to abandon parties or platforms in order to pursue their candidacies is plainly impermissible.

IV. Article I's Qualifications Clauses Limit State Authority to Erect Obstacles, like Mandatory Filing Fees, that Bar or Handicap Classes of Candidates for Congress.

The Third Circuit's Qualifications Clause analysis contradicts the approach taken by the Ninth, Tenth and Eleventh Circuits. In *Schaefer v. Townsend*, 215 F.3d 1031, 1035 (9th Cir. 2000), for example, the Ninth Circuit concluded that this Court's decision in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), "introduced two inquiries .... First, ... whether the ... statutes create an absolute bar to candidates who would otherwise qualify under the Qualifications Clause. [Second,] ... whether they have the likely effect of handicapping an otherwise qualified class of candidates." Using this two-prong analysis, the Ninth Circuit struck down California's requirement that candidates reside in the state when filing for congressional office. The Tenth Circuit applied this same standard to strike down Colorado's requirement that candidates for congressional office be registered to vote. *See Campbell v. Davidson*, 233 F.3d 1229 (10th Cir. 2000). The Eleventh Circuit, meanwhile, has concluded that "procedural" access requirements do not bar or handicap candidates. It has thus sustained signature collection requirements that have been challenged under Article I, s*ee Cartwright v. Barnes,* 304 F.3d 1138 (11th Cir. 2002), as well as the Equal Protection Clause. *See, e.g., Green v. Mortham*, 155 F.3d 1332 (11th Cir. 1998).

The Third Circuit here, contrary to all three of these decisions, simply inquired whether Delaware's $3000 filing fee imposed a restriction that was "inherent in the candidate," App., *infra*, at A-30, a concept neither discussed in nor implied by *Thornton*. Biener, according to the Third Circuit, could have easily found someone to pay the fee on his behalf. Moreover, the court opined, "the purpose of the filing fee is to keep Delaware's ballots manageable." App., *infra*, at A-31. Hence, even if the fee amounted to a qualification, Delaware was justified in charging it.

Neither rationale is persuasive. This Court in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), ruled that the Founding Fathers never intended states to have the constitutional power to prescribe qualifications for congressional candidates. It made clear that the Framers did not intend states to set wealth or property requirements for members of Congress. *See* 2 Records of the Federal Convention of 1787 120-26 (Farrand, ed. 1966). Using the Third Circuit's logic, not even a patent property requirement would violate the Qualifications Clauses. Candidates, after all, could always solicit the needed property from others and thereby satisfy any wealth or property test. Such a requirement would prove no more "inherent in the candidate" than Delaware's $3000 filing fee.

Article I, moreover, does not allow states the luxury of prescribing additional qualifications in order to manage the ballot. Once a qualification is unmasked, there is no room for balancing interests. Whether nominally deemed a "qualification" or an "access requirement," the restriction is *per se* invalid. *See Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9th Cir. 2000) ("The *Term Limits* Court rejected ... a broad reading of the Elections Clause and held the balancing test inapplicable where the challenged provision supplemented the Qualifications Clause").

Delaware's fee bars a significant number of candidates from running for Congress. While Delaware

excuses *some*, the vast majority of candidates are measured by their ability to pay. Any candidate who is not impoverished, is unable to endure a significant personal financial burden, and is unwilling to heed the call of special interests, is barred from Delaware's congressional ballot. Such a result is necessarily inconsistent with *Thornton* and its vision of the Framers' intent.

Thornton expressed concern over "a patchwork of state qualifications" that "undermin[e] ... the national character that the Framers envisioned and sought to ensure." 514 U.S. at 822. It thus struck down an Arkansas constitutional provision precluding incumbents who had served multiple terms from again appearing on congressional ballots. That the Arkansas law was "dressed" in "ballot access clothing," the Court concluded, could not protect it from scrutiny under Article I: "allowing States to evade the Qualifications Clauses by 'dressing eligibility to stand for Congress in ballot access clothing' trivializes the basic principles of our democracy that underlie those Clauses. [The] argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. It is inconceivable that guaranties embedded in the Constitution ... may thus be manipulated out of existence." *Id.* at 831 (citation omitted).

A patchwork of fee requirements and wealth restrictions for congressional elections presently exists in America. In one corner of this tapestry, candidates for House elections in Indiana run unencumbered. They need not choose between their political beliefs and raising campaign revenue from special interests. In another corner, candidates in Delaware must either prove affluent enough to afford paying $3000 or beholden enough to raise this amount through campaign contributions. The fabric between these corners is stitched with a variety of fees and exceptions. Some states demand enormous fees, *see, e.g., Green v. Mortham*, 155 F.3d 1332 (11th Cir. 1998) (observing that Florida's fee is now 6% ($9000) of the annual congressional

salary), but at least offer alternative access to all. *Id.* Others require minimal fees, *see, e.g.* Pa. Stat. Ann. tit. 25, §§ 2872.1 (requiring $150 fee); *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3d Cir. 2003) (striking down Pennsylvania fee to extent it provided no exception for indigents), but allow no exceptions. *Id.* Still others, like Delaware, couple substantial fees with what amounts to no exception. A candidate with $2999 in the bank thus can run for Congress in Indiana, and can collect signatures to gain access in Florida, but must sit out Delaware's Democratic congressional primary.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

C.A. No. 02-514 GMS

STEVEN BIENER, et al.,
Plaintiff,

v.

THE HONORABLE FRANK CALIO,
Defendant.

July 15, 2002

MEMORANDUM AND ORDER

I. INTRODUCTION

The plaintiff, Steven Biener ("Biener") seeks the Democratic Party nomination for United States Representative in the November 2002 election. In furtherance of this goal, Biener submitted his notice of candidacy to the State Commissioner of Elections (the "Commissioner") on June 6, 2002. He did not, however, submit the required $3,000 filing fee. On June 10, 2002, Biener and his co-plaintiff Carol Greenway commenced this action by filing a complaint for injunctive, declaratory, and other relief pursuant to 42 U.S.C. § 1983, alleging that the fee requirement violates the Qualifications, Equal Protection, and Due Process clauses of the United States Constitution.[1]

Presently pending before the court is Biener's motion for a preliminary injunction. Through this motion, Biener seeks to preliminarily enjoin the Commissioner from enforcing the filing fee requirement against candidates for

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[1] Carol Greenway is a registered Democrat who intends to vote for Biener in the Democratic Party primary election on September 7, 2002

federal office. For the following reasons, the court will deny this motion.

II. BACKGROUND

A. The Statutory Scheme

Elections in Delaware are governed by the rules and procedures set forth in Title 15 of the Delaware Code (the "Code"). Sections 3103 and 3106 of the Code require that all nonindigent candidates for elected office pay a filing fee in order to gain access to the ballot. Section 3101 further delegates to the state executive committee of each political party the authority to impose a filing fee on all candidates for statewide office. *See* DEL.CODE ANN. tit. 15, § 3103(a)(1). The Code does, however, provide that the fee "shall not be greater than 1% of the total salary for the entire term of office for which the candidate is filing." DEL.CODE ANN. tit. 15, § 3103(b).

A person desiring to be a candidate for statewide office must tender a copy of the Candidate Filing Form to the chair of the state committee of his or her political party, and must further tender a copy of such Form, along with the required filing fee, to the Commissioner. DEL.CODE ANN. tit. 15, § 3106(a)(1)(b). The Commissioner then notifies each county department of elections of those candidates for statewide office who have qualified under Section 3106 of the Code.

While there is no means provided by Delaware law for waiving the filing fee, there is an alternate means of ballot qualification in the case of a person who is indigent. A person is indigent if such person is receiving benefits under 42 U.S.C. § 1381, or meets the income and resources test for such benefits under 42 U.S.C. § 1382(a).[2] DEL.CODE ANN. tit. 15, § 3103(e).

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[2] Pursuant to 42 U.S.C. § 1382(a), a Delaware resident is currently considered indigent if he or she has a non-earned income of less than $6,540, or earned income of less than $13,080.

The Democratic Party Executive Committee (the "Democratic Committee") is charged with setting filing fees for primary elections of democratic candidates for statewide office. On March 13, 2002, the Democratic Committee voted to impose the maximum filing fee on candidates for the federal offices of United States Representative and United States Senator in the 2002 election. Thus, the filing fee is $3,000 for candidates for the United States House of Representatives and $9,000 for those who wish to run for the United States Senate.

B. Biener's Candidacy

Biener alleges that he is a qualified Democratic Party candidate for U.S. Representative who has met all the constitutional requirements for public office. He has, however, failed to adhere to the above-described statutory scheme by refusing to pay the $3,000 filing fee. Biener maintains that he is unwilling to pay the required filing fee out of his personal savings. He is also refusing public contributions to his campaign.

On April 15, 2002, Biener wrote to the Commissioner and requested that he suspend enforcement of Sections 3103 and 3106 of the Code because the imposition of filing fees on candidates for federal office violates the U.S. Constitution. On May 3, 2002, the Commissioner denied Biener's request, stating that he would enforce the Code as written. On June 6, 2002, Biener sent the Commissioner the candidate filing form that the Code requires, less the $3,000 filing fee. On June 12, 2002, the Commissioner wrote to Biener, acknowledging that he had received the filing form and noting that the filing will be deemed incomplete until the fee is tendered. Consequently, unless Biener tenders the filing fee on or before July 26, 2002, his name will not appear on the Democratic Party's primary ballot on September 7, 2002.

III. DISCUSSION

The purpose of a preliminary injunction "is to preserve the status quo, not to decide the issues on their merits." *Anderson v. Davila*, 125 F.3d 148, 156 (3d Cir. 1997). When deciding a motion for a preliminary injunction, the court must consider the following four factors: (1) the likelihood of success on the merits; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the injunction is granted; and (4) the public interest. *See New Jersey Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995); *see also American Life Ins. Co. v. Parra*, 25 F. Supp. 2d 467, 473 (D. Del 1998). The court shall issue a preliminary injunction only if the plaintiff produces evidence sufficient to demonstrate that all four factors favor preliminary relief. *See Waldman*, 73 F.3d at 512.

A. Likelihood of Success on the Merits

In his complaint, Biener advances three claims. First, he alleges that Sections 3103 and 3106 of the Code impermissibly add a wealth qualification to the age, citizenship, and residency requirements for congressional service specifically enumerated in the Qualifications Clauses of the United States Constitution. *See* U.S. CONST. art. I, § 2, cl.2; art. I, § 3, cl. 3. Second, he alleges that Delaware's filing fee system violates the Equal Protection Clause because the filing fees are not reasonably necessary to accomplish a legitimate state objective. Finally, he alleges that, contrary to the Due Process Clause, Section 3103 constitutes an impermissible delegation of legislative power to a private party. The court will discuss Biener's likelihood of success on the merits with regard to each contention in turn.

1. Qualifications Clauses

Members of the House of Representatives must meet certain age, citizenship, and residency qualifications enumerated in the Constitution. *See* U.S. CONST. art. I, § 2, cl. 2. States have no authority to add their own qualifications. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800801 (1995). Furthermore, states may not evade this constitutional prohibition by "dressing eligibility to stand for Congress in ballot access clothing." *Id.* at 831.

In support of his position on this point, Biener argues that, in *Bullock v. Carter*, the Supreme Court recognized that unreasonable filing fees were the functional equivalent of a wealth qualification. 405 U.S. 134. Without passing on the merits of such an argument, the court expresses sincere doubt that the facts of *Bullock* render it applicable to the current situation. Specifically, the court notes that the *Bullock* Court was faced with an indigent plaintiff and a filing fee requirement that left no alternative avenue for indigent candidates. The facts of the present case, however, differ in at least three important ways.[3] First, the *Bullock* case concerned an equal protection challenge, not a Qualifications Clause challenge. Second, Biener has not alleged that he is indigent. Indeed, he claims that he will be forced to pay the filing fee out of his personal funds, thus insinuating that he does in fact possess sufficient funds to cover this expense. Accordingly, the court views this case not as one where Biener could not pay, but rather, as one where he affirmatively has chosen not to pay. Finally, the statute presently at issue allows for exceptions in the case of indigent individuals. The court thus expresses doubt that *Bullock* is binding authority on the question presently before it.

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[3] Furthermore, in dicta, the Court in *Bullock* was careful to point out that, "[i]t must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts." 405 U.S. at 148.

Additionally, the defendant points to countervailing, albeit state, case law finding that filing fees are merely candidacy requirements, and thus do not per se add to the qualifications required for office. *See Cassidy v. Willis*, 323 A.2d 598, 602 (Del. 1974) (discussing the Delaware Constitution Qualifications Clause in this context); *Bodner v. Gray*, 129 So. 2d 419 (Fla. 1961) (discussing the Florida Constitution Qualifications Clause in this context). Biener summarily argues that these cases are inapposite because they relate to state constitutions. He further argues that to apply these cases to the present situation would run afoul of the Supreme Court's decision in *U.S. Term Limits, Inc. v. Thornton*. 514 U.S. 779 (1995).

In *Thornton*, the Supreme Court ruled that a state law imposing term limits on individuals elected to Congress violated the Qualifications Clause of the United States Constitution. 514 U.S. at 845. In so holding, the Court again reiterated the principle that states have no power to impose additional qualifications on individuals wishing to hold federal public office. *See id.* at 831. Nor may states avoid this prohibition simply by calling a qualification by another name. *See id.*

In light of this opinion, Biener now argues that a filing fee requirement is merely an impermissible qualification dressed in 'ballot access clothing." The court expresses doubts as to this position. Although Biener discusses *Thornton* at great length, Thornton stands for an unremarkable, and uncontested, proposition. Biener has failed to explain, however, how the present state law imposing a procedural fee requirement is, in fact, a substantive wealth qualification "dressed in ballot access clothing."

Biener next engages in a very thorough discussion of the Framer's clear intention to reject a wealth qualification. However, the court finds such a discussion unhelpful in the present context because there does not appear to be a

dispute between the parties on this point.

In light of the foregoing, the court concludes that Biener has failed to meet his burden of demonstrating a likelihood of success on the merits of his Qualifications Clause claim.

2. Equal Protection

In analyzing an equal protection challenge to ballot access laws, the Supreme Court has instructed "that the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." *Bullock*, 405 U.S. at 144.

In the present case, Biener challenges the constitutionality of Section 3103(b), which provides that the filing fee for a statewide candidate "shall not be more than 1% of the total salary for the entire term of office for which the candidate is filing...." Specifically, he argues that the imposition of this filing fee violates the Equal Protection Clause of the United States Constitution because it excludes candidates based upon their economic status, and does nothing to further a legitimate state objective.[4] The court again must express doubt as to Biener's likelihood of success on the merits.

The Supreme Court has recognized that a state has a legitimate interest in regulating the number of candidates on the ballot. *See Bullock*, 405 U.S. at 145. Specifically, the Court has noted that, "the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority . . . voting, without the expense of runoff elections." *Id.* Furthermore, the Court recognized the state interest in

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[4] Biener concedes that his equal protection challenge is based on the lack of a nonpayment alternative for all candidates, not on the reasonableness of the $3,000 filing fee. *See* Plaintiffs' Answering Brief in Opposition to the Defendant's Motion to Dismiss, at 11, n. 5. Thus, the court will not address the reasonableness of the fee.

protecting the integrity of its political processes from frivolous or fraudulent candidacies. *See id.* In light of the Supreme Court jurisprudence on this issue, the court thus expresses its doubts as to the success of an equal protection challenge relating to the legitimacy of Delaware's interests.

Having determined that Delaware may have legitimate interests in this regulation, the court must now determine if Biener is likely to successfully argue that the Delaware filing fee is not reasonably necessary to the accomplishment of those interests. In support of his position, Biener argues that, in *Bullock*, the Supreme Court "expressly rejected" the argument that the payment of a filing fee adequately measures the seriousness of his or her candidacy. Furthermore, citing the Supreme Court case *Lubin v. Panish*, Biener submits that the Court has cited only petition requirements and primary elections as legitimate methods of gauging the seriousness of a candidate's intentions. 415 U.S. 709 (1974). The court must again express doubt as to Biener's interpretation of the Supreme Court's rulings in *Bullock* and *Lubin*.

As the court noted above with regard to *Bullock*, the issue presented in that case dealt solely with a statutory scheme that left no alternatives for indigent individuals wishing to campaign. This was likewise the precise issue addressed in *Lubin*. Thus, while the Court in *Bullock* did find that the fee requirement at issue was not a reasonable means for achieving the stated reason of limiting the ballot to serious candidates, Biener fails to address the full nature of the court's holding. Specifically, the Court stated that:

> There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy, but the candidates in this case affirmatively alleged that they were *unable*, not simply *unwilling*, to pay the assessed fees, and there was no contrary evidence. (emphasis in original)

Bullock, 405 U.S. at 145-146.

Thus, because that State regulatory scheme did not allow access to indigents, the Court held that the filing fee requirement was not relevant to the stated objective of weeding out spurious candidates. *See id.* The Delaware scheme presently at issue unquestionably allows for indigent access. Accordingly, the court finds the holdings in *Bullock* and *Lubin* distinguishable on their facts.

With regard to Biener's argument that the Supreme Court has sanctioned only the use of petitions and primary elections as a means of achieving ballot regulation, the court must again express doubt as to Biener's reading of the case law. Specifically, the *Lubin* Court, in dicta, suggested petitions as an alternative method by which indigent candidates could have their names placed on the ballot without having to pay a filing fee. *See* 415 U.S. at 718. It did not suggest that a filing fee in and of itself was unconstitutional in a situation where the candidate is not indigent, but rather, unwilling to pay the fee, as are the facts of the case at bar.

Moreover, even were the court to be persuaded that *Lubin's* holding is applicable to the present case, the court notes that Delaware's stated reasons for imposing the filing fee are not merely to test the seriousness of candidates. *See* DEL.CODE tit. 15, § 101A (stating that the purpose of the relevant title is to avoid lengthy ballots which tend to create voter confusion and tend to clog the election machinery). On these facts, requiring a fee of non-indigent candidates would appear to be a rational means of furthering the state's interests in regulating the size of the ballot and avoiding voter confusion leading to the clogging of the election machinery. *See Adams v. Askew*, 511 F.2d 703, 704 (5th Cir. 1975) (so holding).

3. Due Process Clause

The Due Process clause contained in the Fourteenth

Amendment of the United States Constitution prohibits a state from "depriv[ing] any person of life, liberty or property, without due process of law." U.S. CONST. amend. 14, § 1. In the present case, Biener challenges Section 3103(a) and (c) as impermissibly delegating the authority to set a filing fee to a private party.

The threshold issue is whether ballot access is a protected liberty or property interest. The Commissioner contends that it is neither because the Supreme Court has held that impositions on the right to run for state political office do not implicate the Due Process Clause. *See Snowden v. Hughes*, 321 U.S. 1, 7 (1944). The Supreme Court has not, however, addressed this issue in terms of a federal political office. Furthermore, the only lower court decision to address the topic as it relates to federal political office summarily disposed of the candidate's claim of a due process violation with little analysis. *See Fowler v. Adams*, 315 F. Supp. 592, 595 (M.D. Fla. 1970). Thus, in addition to having been effectively overruled on other grounds by subsequent decisions, this citation is, at least, unpersuasive. *See Fair v. Taylor*, 359 F. Supp. 304 (MD. Fla. 1973), vacated, *Bush v. Sebesta*, 416 U.S. 918 (1974).

In contrast, Biener argues that access to official election ballots represents an integral element in the effective exercise and implementation of First Amendment activities.[5] As support for this proposition, he cites to *Briscoe v. Kusper*. 435 F.2d 1046, 1053 (7th Cir. 1970). In Briscoe, the court was faced with an argument that the Chicago Board of Election Commissioners had improperly interpreted and applied the relevant statutory provisions in denying candidates with legally sufficient petitions places on the ballots. *See id.* On those facts, the Seventh Circuit

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[5] It is undisputed that the concept of "liberty" protected against state impairment by the Due Process Clause of the Fourteenth Amendment includes the freedoms of speech and association. *See Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

determined that the Supreme Court's decision in *Snowden v. Hughes*, which found no property interest in the right to run for state office, did not preempt consideration of the plaintiffs' constitutional due process claim on the bases of freedom of speech and association. *See id.* at 1054. In light of the Seventh Circuit's analysis, and again expressing no view on the ultimate merit of Biener's contentions, the court concludes that Biener has at least a colorable liberty interest argument. For purposes of the present motion then, the court will continue on with its Due Process Clause analysis.

Assuming that there is a liberty or property interest at stake, the Due Process Clause limits the manner and extent to which a state legislature may delegate legislative authority to a private party. *See General Elec. Co. v. New York State Dept. of Labor*, 936 F.2d 1448, 1454 (2d Cir. 1991) (collecting cases). Specifically, a delegation of authority that fails to supply standards sufficient to guide a private party's discretion runs afoul of the Constitution. *See id.* at 1455.

At issue is Section 3103, which provides that the filing fee exacted by the political party shall not be greater than one percent of the total salary for the entire term of office for which the candidate is filing. Biener contends that this language fails to provide the requisite guidance to Delaware's political parties. Specifically, he argues that the statute lacks any suggestion of how the fee should be set or what criteria to use in setting the fee to meet the state's interests.

The court doubts the merits of this contention. In capping the fee at one percent, the state legislature has implicitly, if not explicitly, determined that any fees within that range would adequately address the state's legitimate ballot concerns. Any discretion that the political parties retain within that zero to one percent fee range is simply de minimus.

Thus after having thoroughly considered Biener's likelihood of success on the merits of each of his three

constitutional claims, the court concludes that he has not demonstrated such a likelihood on any of them. Further, as he has not met the first requirement for a preliminary injunction, the court need not continue with its analysis of the remaining factors. *See Waldman*, 73 F.3d at 512 (stating that the court shall issue an injunction "only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief.").

IV. CONCLUSION

Because Biener has failed to demonstrate a likelihood of success on the merits, the court is powerless to grant the requested injunctive relief.

For these reasons, IT IS HEREBY ORDERED that:
1. Biener's motion for a preliminary injunction (D.I. 5) is DENIED.

Date: July 15, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

C.A. No. 02-514 GMS

STEVEN BIENER, et al.,
Plaintiffd,

v.

THE HONORABLE FRANK CALIO, et al.,
Defendants.

Filed: January 21, 2003

MEMORANDUM AND ORDER

I. INTRODUCTION

The plaintiff, Steven Biener ("Biener") sought the Democratic Party nomination for United States Representative in the November 2002 election. In furtherance of this goal, Biener submitted his notice of candidacy to the State Commissioner of Elections (the "Commissioner") on June 6, 2002. He did not, however, submit the required $3,000 filing fee. On June 10, 2002, Biener and his co-plaintiff Carol Greenway commenced this action by filing a complaint for injunctive, declaratory, and other relief pursuant to 42 U.S.C. § 1983, alleging that the fee requirement violates the Qualifications, Equal Protection, and Due Process clauses of the United States Constitution.[1]

The court denied Biener's motion for a preliminary injunction by Memorandum and Order dated July 15, 2002. On July 25, 2002, Biener tendered his $3,000 filing fee under

[1] Carol Greenway is a registered Democrat who intended to vote for Biener in the Democratic Party primary election on September 7, 2002.

protest. He thereafter filed his First Amended Complaint, which added a claim for a refund of the $3,000 fee.

Presently before the court are Frank Calio's motion to dismiss, and the Democratic Party of the State of Delaware's and Biener's cross-motions for summary judgment.[2] For the following reasons, the court will grant the defendants' motions and deny Biener's motion.

II. STANDARD OF REVIEW

The court may grant summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). An issue is "genuine" if, given the evidence, a reasonable jury could return a verdict in favor of the non-moving party. *See, e.g., Abraham v. Raso*, 183 F.3d 279, 287 (3d Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986)); *Lloyd v. Jefferson*, 53 F. Supp. 2d 643, 654 (D. Del. 1999) (citing same). A fact is "material" if it bears on an essential element of the plaintiff's claim. *See, e.g., Abraham*, 183 F.3d at 287; *Lloyd*, 53 F. Supp. 2d at 654. On summary judgment, the court cannot weigh the evidence or make credibility determinations. *See Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."); *International Union, United Auto., Aerospace & Ag. Implement Workers of America, U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 137 (3d Cir. 1999) ("At the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the fact finder."). Instead, the court can only determine whether there is a genuine issue for trial. *See Abraham*, 183 F.3d at 287. In doing so, the court must look at the evidence

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[2] The court will construe Calio's motion to dismiss as a motion for summary judgment because the parties reference material outside of the pleadings. *See* FED. R. CIV. P. 12(b).

in the light most favorable to the non-moving party, drawing all reasonable inferences, and resolving all reasonable doubts in favor of that party. *See, e.g., Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). With this standard in mind, the court will now describe the facts leading to the motions presently before the court.

III. BACKGROUND

A. The Statutory Scheme

Elections in Delaware are governed by the rules and procedures set forth in Title 15 of the Delaware Code (the "Code"). Sections 3103 and 3106 of the Code require that all nonindigent candidates for elected office pay a filing fee in order to gain access to the ballot. Section 3101 further delegates to the state executive committee of each political party the authority to impose a filing fee on all candidates for statewide office. *See* DEL. CODE ANN. tit. 15, § 3103(a)(1). The Code does, however, provide that the fee "shall not be greater than 1% of the total salary for the entire term of office for which the candidate is filing." DEL. CODE ANN. tit. 15, § 3103(b).

A person desiring to be a candidate for statewide office must tender a copy of the Candidate Filing Form to the chair of the state committee of his or her political party, and must further tender a copy of such Form, along with the required filing fee, to the Commissioner. DEL. CODE ANN. tit. 15, § 3106(a)(1)(b). The Commissioner then notifies each county department of elections of those candidates for statewide office who have qualified under Section 3106 of the Code.

While there is generally no means provided by Delaware law for waiving the filing fee, there is an alternate means of ballot qualification in the case of a person who is indigent. A person is indigent if such person is receiving benefits under 42 U.S.C. § 1381, or meets the income and resources test for such benefits under 42 U.S.C. §

1382(a).[3] DEL. CODE ANN. tit. 15, § 3103(e).

The Democratic Party Executive Committee (the "Democratic Committee") is charged with setting filing fees for primary elections of democratic candidates for statewide office. On March 13, 2002, the Democratic Committee voted to impose the maximum filing fee on candidates for the federal offices of United States Representative and United States Senator in the 2002 election. Thus, the filing fee is $3,000 for candidates for the United States House of Representatives and $9,000 for those who wish to run for the United States Senate.

B. Biener's Candidacy

Biener alleges that he was a qualified Democratic Party candidate for U.S. Representative who had met all the constitutional requirements for public office. However, he protested against the $3,000 filing fee. Although he eventually did pay the fee, he maintains that this requirement is unconstitutional.

On April 15, 2002, Biener wrote to the Commissioner and requested that he suspend enforcement of Sections 3103 and 3106 of the Code because the imposition of filing fees on candidates for federal office violates the U.S. Constitution. On May 3, 2002, the Commissioner denied Biener's request, stating that he would enforce the Code as written. On June 6, 2002, Biener sent the Commissioner the candidate filing form that the Code requires, less the $3,000 filing fee. On June 12, 2002, the Commissioner wrote to Biener, acknowledging that he had received the filing form and noting that the filing will be deemed incomplete until the fee is tendered.

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[3] Pursuant to 42 U.S.C. § 1382(a), a Delaware resident is currently considered indigent if he or she has a non-earned income of less than $6,540, or earned income of less than $13,080.

Biener paid the filing fee on July 25, 2002. At the September 7, 2002 primary election, he lost his bid for the Democratic Party's nomination for Delaware's seat in the United States House of Representatives.

IV. DISCUSSION

In his complaint, Biener advances three claims. First, he alleges that Sections 3103 and 3106 of the Code impermissibly add a wealth qualification to the age, citizenship, and residency requirements for congressional service specifically enumerated in the Qualifications Clauses of the United States Constitution. *See* U.S. CONST. art. I, § 2, cl.2; art. I, § 3, cl. 3. Second, he alleges that Delaware's filing fee system violates the Equal Protection Clause because the filing fees are not reasonably necessary to accomplish a legitimate state objective. Finally, he alleges that, contrary to the Due Process Clause, Section 3103 constitutes an impermissible delegation of legislative power to a private party. The court will discuss each of Biener's claims in turn.

A. Qualifications Clause

Members of the House of Representatives must meet certain age, citizenship, and residency qualifications enumerated in the Constitution. *See* U.S. CONST. art. I, § 2, cl. 2. States have no authority to add their own qualifications. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800801 (1995). Furthermore, states may not evade this constitutional prohibition by "dressing eligibility to stand for Congress in ballot access clothing." *Id.* at 831.

In support of his position on this point, Biener argues that, in *Bullock v. Carter*, the Supreme Court recognized that unreasonable filing fees were the functional equivalent of a wealth qualification. 405 U.S. 134. The court must disagree that the facts of *Bullock* render it applicable to the current situation. Specifically, the court notes that the *Bullock* Court was faced with an indigent plaintiff and a filing

fee requirement that left no alternative avenue for indigent candidates. The facts of the present case, however, differ in at least three important ways.[4] First, the *Bullock* case concerned an equal protection challenge, not a Qualifications Clause challenge. Second, Biener has not alleged that he is indigent. Indeed, on July 25, 2002, he paid the filing fee in full, demonstrating that he does in fact possess sufficient funds to cover this expense. Accordingly, the court views this case not as one where Biener could not pay, but rather, as one where he affirmatively has chosen not to pay without protest. Finally, the statute presently at issue allows for exceptions in the case of indigent individuals. The court thus concludes that *Bullock* is not binding authority on the question presently before it.

Additionally, the defendant points to countervailing, albeit state, case law finding that filing fees are merely candidacy requirements, and thus do not per se add to the qualifications required for office. *See Cassidy v. Willis*, 323 A.2d 598, 602 (Del. 1974) (discussing the Delaware Constitution Qualifications Clause in this context); *Bodner v. Gray*, 129 So. 2d 419 (Fla. 1961) (discussing the Florida Constitution Qualifications Clause in this context). Biener summarily argues that these cases are inapposite because they relate to state constitutions. He further argues that to apply these cases to the present situation would run afoul of the Supreme Court's decision in *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779 (1995).

In *Thornton*, the Supreme Court ruled that a state law imposing term limits on individuals elected to Congress violated the Qualifications Clause of the United States Constitution. 514 U.S. at 845. In so holding, the Court again reiterated the principle that states have no power to impose

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[4] Furthermore, in dicta, the *Bullock* Court was careful to point out that, "[i]t must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts." 405 U.S. at 148.

additional qualifications on individuals wishing to hold federal public office. *See id.* at 831. Nor may states avoid this prohibition simply by calling a qualification by another name. *See id.*

In light of this opinion, Biener now argues that a filing fee requirement is merely an impermissible qualification dressed in "ballot access clothing." The court must disagree. Although Biener discusses *Thornton* at great length, *Thornton* stands for an unremarkable, and uncontested, proposition. Biener has failed to explain, however, how the present state law imposing a procedural fee requirement is, in fact, a substantive wealth qualification "dressed in ballot access clothing."

Biener next engages in a very thorough discussion of the Framer's clear intention to reject a wealth qualification. However, the court finds this discussion unhelpful in the present context because there does not appear to be a dispute between the parties on this point.

The court thus concludes that Biener has failed to demonstrate that Delaware's fee requirement is an impermissible wealth qualification.

B. Equal Protection

In analyzing an equal protection challenge to ballot access laws, the Supreme Court has instructed "that the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." *Bullock*, 405 U.S. at 144.

In the present case, Biener challenges the constitutionality of Section 3103(b), which provides that the filing fee for a statewide candidate "shall not be more than 1% of the total salary for the entire term of office for which the candidate is filing " Specifically, he argues that the imposition of this filing fee violates the Equal Protection Clause of the United States Constitution because it excludes candidates based upon their economic status, and

does nothing to further a legitimate state objective.[5] The court must again disagree.

The Supreme Court has recognized that a state has a legitimate interest in regulating the number of candidates on the ballot. *See Bullock*, 405 U.S. at 145. Specifically, the Court has noted that, "the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority . . . voting, without the expense of runoff elections." *Id.* Furthermore, the Court recognized the state interest in protecting the integrity of its political processes from frivolous or fraudulent candidacies. *See id.* Delaware has advanced similar objectives in establishing its candidate filing fee. Therefore, in light of the Supreme Court jurisprudence on this issue, the court finds Delaware's interests to be legitimate.

Having determined that Delaware has legitimate interests in this regulation, the court must now determine if Delaware's filing fee is reasonably necessary to the accomplishment of those interests. In support of his position, Biener contends that, in *Bullock*, the Supreme Court "expressly rejected" the argument that the payment of a filing fee adequately measures the seriousness of his or her candidacy. Furthermore, citing the Supreme Court case *Lubin v. Panish*, Biener submits that the Court has cited only petition requirements and primary elections as legitimate methods of gauging the seriousness of a candidate's intentions. 415 U.S. 709 (1974). The court must again disagree with Biener's interpretation of the Supreme Court's rulings in *Bullock* and *Lubin*.

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[5] Biener concedes that his equal protection challenge is based on the lack of a nonpayment alternative for all candidates, not on the reasonableness of the $3,000 filing fee. *See* Plaintiffs' Answering Brief in Opposition to the Defendant's Motion to Dismiss, at 11, n. 5. Thus, the court will not address the reasonableness of the fee.

As the court noted above with regard to *Bullock*, the issue presented in that case dealt solely with a statutory scheme that left no alternatives for indigent individuals wishing to campaign. This was likewise the precise issue addressed in *Lubin*. Thus, while the Court in *Bullock* did find that the fee requirement at issue was not a reasonable means for achieving the stated reason of limiting the ballot to serious candidates, Biener fails to address the full nature of the court's holding. Specifically, the Court stated that:

> There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy, but the candidates in this case affirmatively alleged that they were *unable*, not simply *unwilling*, to pay the assessed fees, and there was no contrary evidence. (emphasis in original)

Bullock, 405 U.S. at 145-146.

Thus, because that State regulatory scheme did not allow access to indigents, the Court held that the filing fee requirement was not relevant to the stated objective of weeding out spurious candidates. *See id.* The Delaware scheme presently at issue unquestionably allows for indigent access. Accordingly, the court finds the holdings in *Bullock* and *Lubin* distinguishable on their facts.

With regard to Biener's argument that the Supreme Court has sanctioned only the use of petitions and primary elections as a means of achieving ballot regulation, the court must take exception with Biener's reading of the case law. Specifically, the *Lubin* Court, in dicta, suggested petitions as an alternative method by which indigent candidates could have their names placed on the ballot without having to pay a filing fee. *See* 415 U.S. at 718. It did not suggest that a filing fee in and of itself was unconstitutional in a situation where the candidate is not indigent, but rather, unwilling to pay the fee, as are the facts in the case at bar.

Moreover, even were the court to be persuaded that *Lubin's* holding is applicable to the present case, the court notes that Delaware's stated reasons for imposing the filing fee are not merely to test the seriousness of candidates. *See* DEL. CODE tit. 15, § 101A (stating that the purpose of the relevant title is to avoid lengthy ballots which tend to create voter confusion and tend to clog the election machinery.). On these facts, requiring a fee of non-indigent candidates is a rational means of furthering the state's interests in regulating the size of the ballot and avoiding voter confusion leading to the clogging of the election machinery. *See Adams v. Askew*, 511 F.2d 703, 704 (5th Cir. 1975) (so holding).

C. Due Process Clause

The Due Process clause contained in the Fourteenth Amendment of the United States Constitution prohibits a state from "depriv[ing] any person of life, liberty or property, without due process of law." U.S. CONST. amend. 14, § 1. In the present case, Biener challenges Section 3103(a) and (c) as impermissibly delegating the authority to set a filing fee to a private party.

The threshold issue is whether ballot access is a protected liberty or property interest. The Commissioner contends that it is neither because the Supreme Court has held that impositions on the right to run for state political office do not implicate the Due Process Clause. *See Snowden v. Hughes*, 321 U.S. 1, 7 (1944). The Supreme Court has not, however, addressed this issue in terms of a federal political office. Furthermore, the only lower court decision to address the topic as it relates to federal political office summarily disposed of the candidate's claim of a due process violation with little analysis. *See Fowler v. Adams*, 315 F. Supp. 592, 595 (M.D. Fla. 1970). Thus, in addition to having been effectively overruled on other grounds by subsequent decisions, this citation is, at least, unpersuasive. *See Fair v. Taylor*, 359 F. Supp. 304 (MD. Fla. 1973), vacated, *Bush v. Sebesta*, 416 U.S. 918 (1974).

In contrast, Biener argues that access to official election ballots represents an integral element in the effective exercise and implementation of First Amendment activities.[6] As support for this proposition, he cites to *Briscoe v. Kusper*, 435 F.2d 1046, 1053 (7th Cir. 1970). In *Briscoe*, the court was faced with an argument that the Chicago Board of Election Commissioners had improperly interpreted and applied the relevant statutory provisions in denying candidates with legally sufficient petitions places on the ballots. *See id.* On those facts, the Seventh Circuit determined that the Supreme Court's decision in *Snowden v. Hughes*, which found no property interest in the right to run for state office, did not preempt consideration of the plaintiffs' constitutional due process claim on the bases of freedom of speech and association. *See id.* at 1054. In light of the Seventh Circuit's analysis, the court concludes that Biener has at least a colorable liberty interest argument. Nevertheless, the court need not decide this issue. This is so because, for the following reasons, the court finds that Biener's claim must fail.

The Due Process Clause limits the manner and extent to which a state legislature may delegate legislative authority to a private party. *See General Elec. Co. v. New York State Dept. of Labor*, 936 F.2d 1448, 1454 (2d Cir. 1991) (collecting cases). Specifically, a delegation of authority that fails to supply standards sufficient to guide a private party's discretion runs afoul of the Constitution. *See id.* at 1455.

At issue is Section 3103, which provides that the filing fee exacted by the political party shall not be greater than one percent of the total salary for the entire term of office for which the candidate is filing. Biener contends that

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[6] It is undisputed that the concept of "liberty" protected against state impairment by the Due Process Clause of the Fourteenth Amendment includes the freedoms of speech and association. *See Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

this language fails to provide the requisite guidance to Delaware's political parties. Specifically, he argues that the statute lacks any suggestion of how the fee should be set or what criteria to use in setting the fee to meet the state's interests.

The court disagrees. In capping the fee at one percent, the state legislature has implicitly, if not explicitly, determined that any fees within that range would adequately address the state's legitimate ballot concerns. Any discretion that the political parties retain within that zero to one percent fee range is simply de minimus.

Thus, after having thoroughly considered Biener's arguments on each of his three constitutional claims, the court concludes that summary judgment is warranted in favor of the defendants on each of these claims.

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. The Democratic Party's Amended Motion for Summary Judgment (D.I. 20) is GRANTED.

2. Calio's Motion to Dismiss (D.I. 8) is GRANTED.

3. Biener's Motion for Summary Judgment (D.I. 23) is DENIED.

4. Judgment be and is hereby entered in favor of the Defendants.

Dated: January 21, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF
APPEALS FOR THE TH IRD CIRCUIT

No. 03-1607

STEVEN BIENER; CAROL
GREENWAY,
Appellants

v.

FRANK CALIO, THE HONORABLE, STATE
ELECTION COMMISSIONER;
DEMOCRATIC PARTY OF THE
STATE OF DELAWARE.

[Argued Oct. 28, 2003
Opinion filed: March 19, 2004]

BEFORE: SCIRICA , Chief Judge, NYGAARD, and AMBRO, Circuit Judges.

OPINION OF THE COURT

NYGAARD, Circuit Judge.

Appellant Steven Biener, a Delaware citizen who sought nomination as the Democratic Party's candidate for the United States House of Representatives ("the House"), appeals the District Court's grant of summary judgment against him. Biener and Carol Greenway, a registered voter who is a Biener supporter, sued the Democratic Party of the State of Delaware ("the Party") and Frank Calio, Delaware's state commissioner for elections, alleging that the $3000filing fee for the 2002 Democratic primary was unconstitutional. The District Court rejected Biener's arguments under the Qualifications, Equal

Protection, and Due Process Clauses and granted summary judgment on behalf of the Party and Calio.

The Delaware statute provides a filing fee exception for indigent candidates who are unable to pay a fee. Biener challenges the lack of a ballot access alternative for non-indigent candidates. He asserts that he should have a choice not to pay the fee. We conclude that the availability of a choice is outcome determinative for Biener's Qualifications and Equal Protection Clause claims. Those claims fail. Additionally, we conclude that there is no due process violation. We will therefore affirm the District Court's grant of summary judgment.

I. FACTS AND PROCEDURAL HISTORY

Unlike general elections, which are held by the state to select government office-holders, primary elections are conducted by the state on behalf of and as a convenience to political parties to assist them in selecting their candidates for office. Under Delaware law, individual political parties share responsibility with the state for election primaries. Political parties are authorized to set the filing fee amount, so long as it does not exceed 1% of the total salary for the term of office the candidate seeks. 15 Del. Code § 3103(a)-(c). In 2002, the Party set the filing fee for candidacy to the House at $3000.

When a party opts to impose a filing fee on candidates, Delaware law provides only one exception. 15 Del. Code § 3103(d)-(e). Candidates who demonstrate they are indigent by virtue of qualification for federal benefits may, in lieu of a filing fee, access the primary ballot by obtaining signatures on a petition. *Id.*

Biener sought to be included on the ballot for the 2002 Democratic primary as a candidate for the House. He ran on an anti-election spending and anti-special interest platform, and did not solicit money for his campaign. Biener submitted the necessary paperwork to

the state and the Party, but was informed that because he is non-indigent he needed to remit the $3000 filing fee or would be left off the Democratic primary ballot.

Biener filed suit against Calio seeking declaratory and injunctive relief. Calio filed an unopposed motion to join the Party as a defendant, and that motion was granted. The District Court denied Biener relief, stating that Biener had not shown a likelihood of success on any of his claims.

Once his complaint for declaratory and injunctive relief was rejected, Biener paid the $3000 filing fee. He then amended his complaint to seek a refund of the fee, which constituted two-thirds of the entire amount expended on his campaign. After paying the fee, Biener was included on the Democratic primary ballot and received 48% of the votes but did not win the Democratic nomination.

Biener's suit alleged that the filing fee requirement is unconstitutional on three grounds: (1) it adds an impermissible wealth requirement to the qualifications for House membership, (2) it denies equal protection to non-indigent candidates who would like to seek office without paying a filing fee, and (3) it violates the Due Process Clause because it inappropriately delegates state power to political parties. Calio and the Party made a motion for summary judgment, which the District Court granted on all three grounds.

II. DISCUSSION

We have jurisdiction pursuant to 28 U.S.C. § 1291, since this is an appeal of a final decision of a federal district court. We exercise plenary review over all jurisdictional questions, including whether a plaintiff has standing to assert a particular claim. *See Gen. Instrument Corp. of Del. v. Nu-Tek Elec. & Mfg., Inc.*, 197 F.3d 83, 86 (3d Cir. 1999). We also review the District Court's decision to grant summary judgment on a plenary basis. *See Blair v. Scott Specialty Gases*, 283 F.3d 595, 602-03 (3d Cir. 2002). A

grant of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In reviewing the grant of summary judgment, we must affirm if the record evidence submitted by the nonmovant 'is merely colorable or is not significantly probative.'" *See Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 232 (3d Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)).

A. STANDING

As a threshold matter, we must consider whether Biener has standing to make his claims. Our decision here is informed by our recent opinion in *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3d Cir. 2003). In that case, which involved a challenge to Pennsylvania's election filing fees, we rejected the argument "that a candidate challenging a mandatory filing fee must establish that payment of the fee would result in the complete depletion of personal or campaign funds in order to demonstrate injury to a protected interest." *Id.* at 640.

Biener, by paying the $3000 filing fee in protest, depleted two-thirds of his campaign funds. This is an injury in fact, which is clearly traceable to the filing fee set by the Party and Calio. The injury also can be redressed by a favorable decision in this court. Biener thus has standing to challenge the filing fee on his own behalf. *See AT&T Communications of N.J., Inc. v. Verizon N.J., Inc.*, 270 F.3d 162, 170 (3d Cir. 2001) (reciting the three elements of a case or controversy for purposes of standing: injury, causation, and redressability); *see also Belitskus*, 343 F.3d at 640 (citing *Green v. Mortham*, 155 F.3d 1332 (1998), an Eleventh Circuit Court of Appeals case in which the candidate used campaign contributions to pay the filing

fee under protest and the court did not question his standing).

Biener also purports to make claims on behalf of indigent or near-indigent individuals. For example, Biener alleges that Delaware's alternative to filing fees for indigent candidates is illusory because so few people qualify as indigent under the statutory definition. Biener does not contend, however, that he is in the group of near-indigent individuals who are allegedly prevented from availing themselves of this ballot-access alternative. Because he is not a member of that group nor does he possess a "close relationship" worthy of allowing him to act as a third-party, Biener lacks standing to make this claim. *See Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 288 (3d Cir. 2002) ("It is a well-established tenet of standing that a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.") (internal quotations omitted).

B. QUALIFICATIONS CLAUSE

The District Court held that Delaware's filing fee for the Democratic primary does not violate the Qualifications Clause by improperly adding a wealth requirement to the qualifications for House membership. The Qualifications Clause of the United States Constitution states that "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. Supreme Court precedent establishes that states have no power to add to these age, citizenship, and residency requirements. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798-99 (1995) (citing a long list of cases in numerous courts that conclude states lack the authority to supplement the qualifications in the Qualifications Clause). Furthermore, states should not attempt to disguise qualifications for office as

qualifications for election as a way to circumvent this rule, or they risk the qualifications for election being found unconstitutional. *Id.* at 831 ("[D]ressing eligibility to stand for Congress in ballot access clothing trivializes the basic principles of our democracy that underlie [the Qualifications] clause[]") (internal quotations omitted). The issue here is whether the filing fee for the Democratic primary constitutes an additional qualification for House membership.

Biener's Qualifications Clause claim is based in large part on *Thornton*, in which the Supreme Court found a term-limitation statute unconstitutional as an impermissible attempt to add to the qualifications for office established by the Constitution. *Id.* at 837-38. Latching onto *Thornton*, Biener argues that Delaware's filing fee is an eligibility requirement for office and thus an impermissible wealth qualification. In support of his claim, Biener points to the debate by the Framers of the Constitution over whether to include a wealth or property-holding requirement in the Qualifications Clause, and their ultimate decision that qualifications would be limited to age, citizenship, and residency.

Thornton and the "impressive and uniform body of judicial decisions" cited therein where courts have struck down laws on the basis that they improperly added qualifications to those found in the Qualifications Clause focus on qualifications that were inherent in the candidate. *See, e.g., Thornton*, 514 U.S. at 800. For instance, all of the following qualifications have been found unconstitutional: term limits; district residency requirements; loyalty oath requirements; voter registration requirements; and restrictions on those convicted of felonies. *See, e.g., id.* at 799; *Schaefer v. Townsend*, 215 F.3d 1031, 1039 (9th Cir. 2000); *Campbell v. Davidson*, 233 F.3d 1229, 1231 (10th Cir. 2000). Unlike these impermissible qualifications, the filing fee for the Democratic primary is not inherent in the candidate. *See Fowler v. Adams*, 315 F.Supp. 592, 594 (M.D. Fla. 1970) (stating that a filing fee,

unlike the Article I, Section 2, Clause 2 "Qualifications," "is not personal to the candidate but may be paid by anyone in his behalf").

In a recent case before this Court, we rejected a Qualifications Clause challenge to the Hatch Act because "[t]he Act allows a citizen a choice." *Merle v. United States*, 351 F.3d 92, 97 (3d Cir. 2003). There, we took notice that a "resign to run" law may force the prospective candidate to make a choice between federal employment and running for elective office, but does not constitute an "additional qualification for the office of United States Representative." *Id.* Likewise, a candidate financially able to pay a filing fee, but unwilling to do so, is not being subjected to an impermissible wealth requirement.

Finally, we disagree with Biener's contention that *Thornton* capsized existing precedent upholding states' rights to require filing fees. *See Fowler*, 315 F.Supp. at 594; *Cassidy v. Willis*, 323 A.2d 598, 602 (Del. 1974); *Bodner v. Gray*, 129 So.2d 419, 420-21 (Fla. 1961); *Kenneweg v. Allegheny County Comm'rs*, 62 A. 249, 251 (Md. 1905). Even after *Thornton*, states still have the right to regulate elections by imposing reasonable requirements on candidates. In *Thornton*, the Court held that "an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clause[] by handicapping a class of candidates cannot stand." 514 U.S. at 831. Here, there is no avowed purpose to evade the constitution and exclude a class; instead, the purpose of the filing fee is to keep Delaware's ballots manageable. Moreover, the logical consequences of Biener's argument would jeopardize states' use of signature requirements.

C. EQUAL PROTECTION CLAUSE

Next, we address whether the District Court erred when it granted summary judgment for Appellees Calio and the Party on the Equal Protection Clause claim. Like the District Court, we hold that there is no equal protection

violation. Equal protection jurisprudence mandates a ballot-access alternative for those unable to pay a filing fee. Delaware law complies with this precedent by providing an alternative for indigent candidates. Here, Biener alleges only an unwillingness, not an inability, to pay. In its history, the Supreme Court has considered only two election filing fee cases, both of which were decided on equal protection grounds. In 1972, the Supreme Court struck down an election primary filing fee where it was an "absolute prerequisite" to participation. *Bullock v. Carter*, 405 U.S. 134, 137 (1972). The filing fees in that case were set by the county executive committees of the individual political parties and were subject to limitations only in some counties. *Id.* at 137-38. The proceeds of the fee went to the party. *Id.* at 137. The *Bullock* court said that despite the political parties' involvement with the filing fees, "the mechanism of such elections is the creature of state legislative choice and hence is state action within the meaning of the Fourteenth Amendment." *Id.* at 140 (internal citations and quotations omitted).

The *Bullock* court "closely scrutinized" the filing fee, looking at whether the fee was reasonably necessary to the accomplishment of legitimate state objectives. *Id.* at 144. The Court recognized that states have a legitimate interest in regulating the number of candidates on the ballot to "prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality." *Id.* at 145. Additionally, it is a legitimate objective for states to protect the ballot from including frivolous or fraudulent candidates. *Id.* But "[t]o say that the filing-fee requirement tends to limit the ballot to the more serious candidates is not enough." *Id.* The Court held the differing treatment must also bear some relevance to the objective, and that in *Bullock* the fee was not reasonably necessary because other means to protect the state's valid interests were available. *Id.* at 145-46. The decision was motivated by a concern that without an

alternative means of ballot access affluent candidates were advantaged. *Id.* at 144.

A few years later, in *Lubin v. Panish*, an indigent candidate brought a class-action suit to prevent California from enforcing its filing fee. 415 U.S. 709 (1974). The California Elections Code made forms required for nomination and election issuable only once candidates paid a non-refundable filing fee. *Id.* at 710. The fee amount was tied to the salary of the office sought. *Id.* As in *Bullock*, the Supreme Court applied a close scrutiny test and held that the fee was unconstitutional because no alternate means of ballot access was available for indigent candidates. *Id.* at 717-18. According to the Court, *Lubin* was a less straightforward case than *Bullock* because California's fees were not as exorbitant. *Id.* at 715 n.4.

More recently, we considered the constitutionality of Pennsylvania's election filing fees. Because the ruling occurred after briefs were filed in this case, we sought comment from the parties on the applicability of *Belitskus*, 343 F.3d 632. In *Belitskus*, we held that Pennsylvania's filing-fee requirement was unconstitutional under the Equal Protection Clause because it failed to provide a reasonable alternative means of ballot access to indigent candidates. *Id.* at 647. We applied a heightened level of scrutiny because indigent plaintiffs were challenging a mandatory filing fee. *Id.* at 644-45.

The issue here is whether the filing fee violated the Equal Protection Clause by extending alternate means of ballot access only to indigent candidates.[1] The parties agree that Biener cannot avail himself of Delaware's alternate means of accessing the ballot—receiving the requisite number of signatures on a campaign petition—because he is not indigent or even near-indigent. Biener's claim is that Delaware's filing fee is unconstitutional because it lacks an

[1] Biener does not challenge the reasonableness of the $3000 filing fee.

equivalent alternative for non-indigent candidates.[2] Biener urges us to find Delaware's filing fee unconstitutional under *Bullock* and *Lubin*. But Biener's reliance on *Bullock* and *Lubin* is misplaced because the candidates in both cases were indigent. *See Bullock*, 405 U.S. at 146 ("the candidates...affirmatively alleged that they were unable, not simply unwilling, to pay the assessed fees"); *see also Cassidy*, 323 A.2d at 601 (noting that in *Lubin* the "inability to pay the fee . . . is so much a part of the decision that we cannot ignore it here"). Biener turns *Bullock* and *Lubin* on their heads when he argues that indigents are advantaged under Delaware's current system because they have an alternative that other candidates do not. Biener's assertion that we should reach the same result as *Bullock* is discouraged by the language of that case, where the Court said the opinion should not be read to "cast doubt on the validity of reasonable candidate filing fees . . . in other contexts." 405 U.S. at 149.

Because Biener is not claiming indigence, *Bullock*, *Lubin*, and *Belitskus*, while not determinative, are informative on the Equal Protection analysis. "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (cited in *Bullock*, *Lubin*, and *Belitskus*).

Our first inquiry in an equal protection challenge is the appropriate level of scrutiny. *See Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 314 (3d Cir. 1999) (en banc). The scrutiny test

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[2] Biener makes an argument that Delaware's definition of indigence is useless because so few people qualify for the alternative means of ballot access. *See* 15 Del. Code § 3101(e). As discussed *supra*, Biener lacks standing to make this argument, as he does not purport to be in the class of near-indigent persons who are excluded.

depends on the filing fee's effect on Biener's rights. *Id.* We need not automatically apply close scrutiny just because this case deals with ballot access. *See Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

In *Belitskus*, we followed the flexible standard set forth in *Anderson v. Celebrezze* for determining the appropriate level of scrutiny in ballot access cases. 460 U.S. 780, 789 (1983), cited in *Belitskus*, 343 F.3d at 643. We decline to apply the *Anderson* balancing test here. In *Belitskus*, such an inquiry was appropriate because First Amendment considerations were at issue. Unlike *Belitskus*, Biener's challenge relies solely on the Fourteenth Amendment and he makes no allegations based on freedom of association. *See Belitskus*, 343 F.3d at 643 n.8 (noting that *Anderson* was not expressly decided on equal protection grounds and thus "some uncertainty exists regarding its applicability to equal protection-based challenges," but applying *Anderson* nonetheless because "neither party challenges its application"); *Anderson*, 460 U.S. at 787 n.7 ("In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis.").[3]

Rather than apply *Anderson*, we proceed on a traditional equal protection analysis, whereby only suspect classes and fundamental rights receive intermediate or strict scrutiny. The right to run for office has not been deemed a fundamental right. *Bullock*, 405 U.S. at 142-43. Biener also cannot establish an infringement on the fundamental right to vote, because "voter's rights are not infringed where a candidate chooses not to run because he is unwilling to comply with reasonable state requirements." *See Adams v. Askew*, 511 F.2d 700, 703 (5th Cir. 1975). As the filing fee does not infringe upon a fundamental right, nor is Biener in a suspect class, we consider the claims under a rational basis

[3] Even if we were to apply the *Anderson* balancing test, our conclusion that we would use a rational basis test would remain unchanged.

test. *See id.* at 703-04 (applying a rational basis test to hold that an alternative to a filing fee was required only for indigent candidates).

Having established that the appropriate test is rational review, the question becomes whether the filing fee meets that standard. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (noting that even under the most deferential of standards, "we insist on knowing the relation between the classification adopted and the object to be obtained"). The justification for the filing fee offered by both the State of Delaware and the Party is that it will help distinguish serious from non-serious candidates to keep the ballot manageable. The Supreme Court has recognized that the interest in keeping ballots manageable, often manifested in a filing fee, is an objective "of the highest order." *Lubin*, 415 U.S. at 715 (referencing *Bullock*, 405 U.S. 134); *Bullock*, 405 U.S. at 145-46 (stating in dicta that "there may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy"). Keeping the ballot manageable is an interest sufficient to meet the low standard of review. *See Belitskus*, 343 F.3d at 647 (stating that distinguishing serious from non-serious candidates is a legitimate interest, but it is not enough where there is no reasonable alternative means of ballot access for indigents).

In concluding that Biener has suffered no equal protection violation here, we follow the conclusion reached by the Fifth Circuit Court of Appeals in *Adams*. 511 F.2d 700. There, the Court was faced with non-indigent candidates who paid the requisite filing fee under protest and sued for a refund alleging the fee was unconstitutional. *Id.* at 701. Basing its decision on *Bullock* and *Lubin*, the Fifth Circuit Court of Appeals held that candidates who were able, but simply unwilling, to pay a filing fee are not entitled to another route to the ballot. *Id.* at 702. The court found determinative that "it is not the statute which perforce

restricts the ballot *but the candidate's decision to pay or not to pay.*" *Id.* at 703 (emphasis added).

> Voters' rights are not infringed where a candidate chooses not to run because he is unwilling to comply with reasonable state requirements. They are no more affected by a candidate's unwillingness to pay a reasonable filing fee than they are when he refuses to comply with financial disclosure laws, or, for that matter, a reasonable petitioning requirement.

Id. We quite agree. The availability of choice is fatal to Biener's equal protection claim.

D. DUE PROCESS CLAUSE

Next, Biener alleges an improper delegation of power under the Due Process Clause. Biener argues that because Delaware allows political parties to set and retain filing fees, 15 Del. Code § 3103 is unconstitutional.[4] We will affirm the District Court, because there is no due process violation where, as here, the state limits the private party's discretion and the private party operates within the established limitations. The Due Process Clause of the Fourteenth Amendment provides that "no State shall . . . deprive any person of life, liberty, or property without due process of law." The Clause "was intended to prevent government from abusing its power, or employing it as an instrument of oppression." *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (internal citations and quotations omitted). The threshold issue here is whether Biener possesses a protected liberty or property interest in access to the Democratic primary ballot. In an analogous case, the Supreme Court held that impositions on the right to run for state political office do not implicate the Due Process Clause. *See Snowden*

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[4] Delaware's authority to set filing fees itself is not at issue. Nor is there a contention that the Party has exceeded the scope of authority delegated to it by the state.

v. Hughes, 321 U.S. 1, 7 (1944). We do not decide here whether the *Snowden* holding would extend to federal elective offices, because even if we were to follow the result of the Supreme Court and hold that the right to run for federal elected office warrants due process protection, doing so would not save Biener's due process claim.

Generally, the Fourteenth Amendment protects individuals only against government action, unless the state has delegated authority to a private party, thereby making the actor a "state actor" and implicating the Due Process Clause. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 195 (1988). The Due Process Clause limits the manner and extent to which a state legislature may delegate legislative authority to a private party acting as a state actor. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Only if the state legislature imposes sufficient limitations is the exercise of authority by the private party constitutional. *See, e.g., Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 12122 (1928) (concluding that the delegation of zoning power to individual 10 landowners violated the due process clause because the ordinance allowed no opportunity for review and left the private parties "free to withhold consent for selfish reasons or arbitrarily . . . [based on] will or caprice"); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912); *Gen. Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1455 (2d Cir. 1991) (noting that delegation without standards allows the private party to exercise selfish or arbitrary motivations or whims). Without sufficient limitations, the delegation of authority can be deemed void for vagueness as allowing ad hoc decisions or giving unfettered discretion to the private party.

In this case, the District Court held that Delaware's limitation on the filing fee amount is a sufficient limitation on the Party's authority to prevent the delegation from running afoul of the Due Process Clause. We agree. Delaware delegates to political parties the authority to set the filing fee for election primaries, so long as the fee

does not exceed 1% of the total salary for the term of office the candidate seeks. 15 Del. Code § 3103. The State also allocates 100% of the fee to the Party for it to keep, or choose to rebate to the candidate in whole or in part. Effectively, the State of Delaware has created a means of revenue production for the Party, but caps the profitability by imposing an upper limit.[5] Contrary to Biener's contention that the Party "controls the price of admission to the electoral process," it is the state that sets the only price that matters to potential candidates who generally pay the filing fee out of campaign coffers—the maximum price.

We have not found, nor has Biener asserted, any instance where a federal appellate court deemed a state delegation unconstitutional under the Due Process Clause for any reason but a lack of standards allowing exercise of the authority on a whim or caprice. There is no evidence that the Party could exercise its ability to set filing fees selfishly, arbitrarily, or based on will or caprice. *See Roberge*, 278 U.S. at 121-22. Biener's reference to *Bartley v. Davis*, a 1986 case from the Delaware Court of Chancery, fails to convince us that the delegation of authority for setting filing fees has been abused by the Party.

III. CONCLUSION

In sum, Delaware's filing fee is constitutional under the Qualifications, Equal Protection, and Due Process Clauses. We will affirm the District Court's summary judgment order.

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[5] What use the Party puts filing fee proceeds to is irrelevant to our analysis. We consider only whether the delegation of authority by the State of Delaware is facially impermissible.

(2)

Supreme Court, U.S.
FILED
JUL 14 2004
OFFICE OF THE CLERK

No. 03-1650

IN THE

Supreme Court of the United States

STEVEN BIENER and CAROL GREENWAY,

Petitioners,

v.

FRANK CALIO, in his official capacity as Delaware Election Commissioner, and The Democratic Party of the State of Delaware,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT DEMOCRATIC PARTY OF THE STATE OF DELAWARE

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court grant a petition for certiorari to review a decision of the Third Circuit upholding a fee imposed by a political party on all non-indigent candidates for nomination, which fee is limited in amount by state law?

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IN THE

Supreme Court of the United States

No. 03-1650

STEVEN BIENER and CAROL GREENWAY,
Petitioners,

v.

FRANK CALIO, in his official capacity as
Delaware Election Commissioner, and
The Democratic Party of the State of Delaware,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT DEMOCRATIC PARTY OF THE STATE OF DELAWARE

COUNTER-STATEMENT OF THE FACTS

Since 1976, Delaware law has required that "major political parties" (those with at least 5 percent of the state's registered voters, Del. Code Ann. tit. 15 § 101(13)(a)) select all of their candidates by a primary. Del. Code Ann. tit. 15 § 3101A. To qualify for the primary ballot, a candidate for nomination must (1) give notice of his or her candidacy on a prescribed form, and (2) pay the fee imposed by the party, Del. Code Ann. tit. 15 § 3106, which may not exceed 1 percent of the salary over the term of office sought. Del. Code Ann. tit. 15 § 3103(b). Any filing fee is tendered by a check,

payable to the party, by the deadline to the appropriate election official, who in turn forwards the check to the political party. Del. Code Ann. tit. 15 § 3106.

So that poverty not be a bar to candidacy, a candidate who meets an objective standard of indigence may qualify for the ballot without paying a fee, upon submitting petitions bearing the signatures of 1 percent of the registered voters in the area to be represented by the candidate. Del. Code Ann. tit. 15 §3103(d). The statute classifies as indigent any person who receives, or is determined by the State Election Commissioner to be eligible to receive, benefits under the Supplemental Security Income (SSI) program of the Social Security System. Del. Code Ann. tit. 15 §3103(e).

Other parties, described as "minor political parties," Del. Code Ann. tit. 15 §101(13)(b), select their candidates by party convention rather than state-run primary. Del. Code Ann. tit. 15 §§ 3101A, 3301(b). The statute does not provide for a filing fee for minor political parties.

Persons not affiliated with a political party may qualify for a position on the ballot by submitting petitions bearing the signatures of 1 percent of the registered voters in the areas to be represented by the candidate. Del. Code Ann. tit. 15 § 3002(b). The statute requires no filing fee for such unaffiliated candidates.

Petitioner Biener sought the Democratic Party's nomination for Delaware's lone seat in the U.S. House of Representatives in 2002. He refused to accept any campaign contributions, made this refusal a central feature of his candidacy, and pledged to spend no more than $1,000 of his own funds during the entire campaign.

Although he was not indigent—during the campaign, he was a member of one of the nation's largest law firms and purchased a residence for $400,000—Petitioner Biener objected to the 1 percent filing fee adopted by the Democratic

Party for all offices, $3,000 for a Congressional candidate, and brought an action in the U.S. District Court of Delaware to avoid payment.

The Petitioner did not claim to be indigent, nor allege that the filing fee was unreasonably large, but rather objected to paying any fee whatsoever, or to raising funds for his campaign to pay the fee.

After the District Court denied the Petitioner's motion for a preliminary injunction, Petitioner Biener paid the filing fee and amended the complaint to request a refund of the filing fee. After further briefing, the District Court granted summary judgment to the Respondents on January 21, 2003.

The Third Circuit affirmed, *Biener v. Calio*, 361 F.3d 206, 217 (3d Cir. 2004), finding the fee to be constitutional under the Qualifications Clause because "there is no avowed purpose to evade the constitution and exclude a class," *Id.* at 212; under the Equal Protection Clause because keeping the ballot manageable is "an interest sufficient to meet the low standard of review," *Id.* at 215; and under the Due Process Clause because "there is no due process violation where, as here, the state limits the private party's discretion and the private party operates within the established limitations." *Id.* at 216.

On June 14, 2004, the Petitioners filed the Petition for Writ of Certiorari in this Court.

SUMMARY OF ARGUMENT

The Third Circuit's decision conflicts with no holding of this Court. No important issue of public policy warrants the Court's attention to this case. No part of the Third Circuit's decision conflicts with the holdings of any other Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE THIRD CIRCUIT DECISION DOES NOT CONFLICT WITH GOVERNING PRECEDENT OF THIS COURT.

This Court has held that a filing fee is a legitimate device that may be imposed as a condition for candidacy, *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), "to prevent the clogging of its election machinery, avoid voter confusion and assure that the winner is a choice of a majority," as well as to protect the integrity of the political process from frivolous or fraudulent candidacies, *Bullock v. Carter*, 405 U.S. 134, 145 (1972), but any statute providing for a filing fee must permit an alternative method of access to the ballot for a candidate who is indigent. *Lubin v. Panish*, 415 U.S. 709, 718 (1974). The Delaware statute contains alternative access for indigent candidates, by permitting them to perfect their candidacy by nominating petitions, and is therefore consistent with governing precedent of this Court.

II. THERE IS NO IMPORTANT ISSUE OF PUBLIC POLICY THAT WARRANTS GRANTING CERTIORARI IN THIS CASE.

The first sentence of Petitioners' Statement of the Case to the contrary, there is no such thing as "Delaware's $3,000 filing fee for House primary elections." The statute only authorizes the "major political parties"—currently the Democratic and Republican Parties—to assess filing fees from candidates for their nomination. The state's role is merely to conduct the primary when there is more than one candidate for nomination, to receive the candidate's nominating papers, and to receive and transmit to the party the check for the filing fee. The statute does not require all candidates to pay a filing fee to run for Congress. Candidates who seek the

nomination of minor political parties, who are indigent or who are unaffiliated with a political party need pay no filing fee.

When there are multiple candidates for a major party's nomination, the statute requires the nominee to be selected by a primary. The political party may, however, impose a fee on those candidates, except those who are indigent. These fees permit the party to verify the seriousness of its potential nominees, forestall fraudulent candidacies, sift out potential candidates unwilling to support the party's goals, and ascertain the commitment of those who would carry its banner.

Just as the State can impose a filing fee as a threshold test of the bona fides of a perspective candidate who proposes to engage the machinery of the State in a primary election, so also do a political party's well-settled rights of association, *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976), permit it to gauge the sincerity of a candidate's intentions, and engage the candidate to support the costs of the party's campaign operations, which necessarily benefit its nominees, by means of a filing fee.

Petitioner Biener seeks to elevate his idiosyncratic campaign platform—of receiving no campaign contributions and spending no more than $1,000 of his own funds—into a constitutional principle. His partiality to the use of nominating petitions is a matter for the legislative branch. That the Delaware legislature has generally shied away from use of petitions is understandable. Nominating petitions spawn contention. They require exhaustive verification by state officials and candidates, leading frequently to litigation over such tedious issues as the validity of signatures, *Appeal of*

Riley, 466 A. 2d 236 (Pa. Comm. 1983), the effect of the sequence of petitioners' filings, *In re Cianfrani*, 359 A. 2d 383 (Pa. Supr. 1976), whether persons have signed their name correctly, *Malinou v. Board of Elections*, 271 A. 2d 798 (R.I. Supr. 1970), or whether petitions must be stapled together. *Petition of Job*, 268 A. 2d 29 (N.J. App. 1970).

Petitions may have their blessings as well. But there is no governing precedent of this Court, nor compelling reason of public policy why states or political parties cannot under the Constitution extract filing fees, regulated in amount by state law, from candidates who are not indigent.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS.

The decision of the Third Circuit conflicts with no decision of any other Circuit Court in any pertinent respect. No decision of any court has held that reasonable filing fees are an impermissible additional "qualification" for office. The Courts agree that reasonable filing fees for candidates for a party's nomination do not violate the Equal Protection Clause if there is an alternative means for an indigent candidate to gain access to the ballot. There is no conflict with the Third Circuit's finding that a State election law, in permitting a political party to set a reasonable, regulated filing fee for its candidates, has not violated the Due Process Clause.

A. There Is No Conflict Concerning The Qualifications Clause.

No court has ever held that a reasonable filing fee constitutes a prohibited additional qualification for office. In so concluding, the Third Circuit joined unanimous authority. *Cassidy v. Willis*, 323 at 602 (Del. 1974); *Fowler v. Adams*, 315 F. Supp. 592 (M.D. Fla. 1970); *Kenneweg v. Allegheny County Commissioners*, 62 A. 249 (Md. Ct. App. 1905).

Morever, as the Third Circuit pointed out, if filing fees were impermissible as a "qualification," nominating petitions would be equally unconstitutional. *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004).

B. There Is No Conflict Concerning The Equal Protection Clause.

The Petitioners contend the Third Circuit erred in applying a rational basis standard in analyzing their Equal Protection challenge. Yet, the rational basis test was the appropriate level of scrutiny because neither a suspect class nor a fundamental right is implicated.

The Court's review of a statute enacted under a State's Constitutionally-delegated authority to conduct elections is reviewed under a flexible standard of scrutiny, under which, depending on the context, the Court's analysis can range from strict scrutiny to a rational basis. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

To trigger close scrutiny of a statute under the Equal Protection Clause, a plaintiff must be a member of a protected class or invoke a fundamental right. Concluding that because reasonable filing fees do not curtail substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments, but rather impose a levy on one who concedes he can afford it, the Third Circuit, like the other Circuits which have reviewed the question, concluded that the analysis is less rigid than in cases of invasive or restrictive government action that would invite strict scrutiny. *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992); *Adams v. Askew*, 511 F.2d 700, 703 (5th Cir. 1975). In *Dixon v. Maryland*, 878 F. 2d 776 (4th Cir. 1989), on which the Petitioners rely in search of a conflict, the portion of the statute which the Fourth Circuit found objectionable was the requirement that unaffiliated write-in candidates post a filing

fee. That situation is not presented here, where unaffiliated candidates obtain access to the ballot by nominating petition.

C. There Is No Conflict Concerning The Due Process Clause

The Petitioners claim that by affirmatively regulating how much of a fee a party may assess of an aspiring nominee, the State has impermissibly delegated legislative authority to a private party. As the Third Circuit noted, the Petitioners cited no federal appellate authority that deemed a state delegation unconstitutional under the Due Process Clause for any reason except where there is a lack of standards (not the case here) which allows the private party to exercise authority "on a whim or caprice." *Biener v. Calio*, 361 F. 3d 206, 217 (3d. Cir. 2004). There is, therefore, no conflict among the circuits with respect to Due Process.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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